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Supreme Court of the United States

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No. 362

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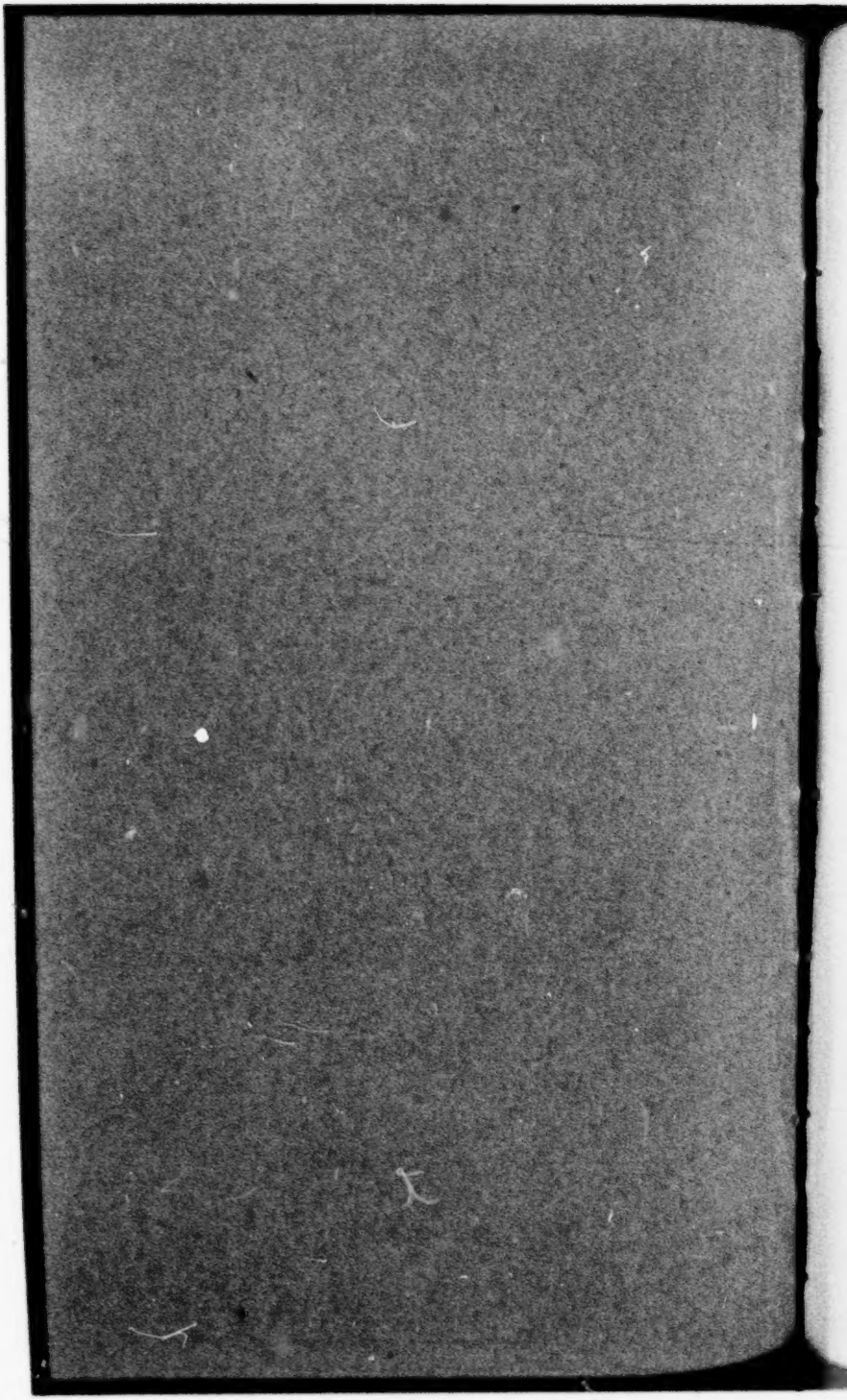

(32,844)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 392

THE JOHN P. KING MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF AUGUSTA AND RALEIGH H. DANIEL, MAYOR, ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

INDEX

	Original	Print
Proceedings in supreme court of Georgia	1	1
Writ of error	2	1
Citation and service (omitted in printing)	4	
Service of writ of error (omitted in printing)	5	
Petition for writ of error and order allowing same	6	2
Waiver of filing of supersedeas bond (omitted in printing)	10	
Bond on writ of error (" " " ")	12	
Stipulation as to transcript of record (" " " ")	14	
Judgment (" " " ")	16	
Order vacating judgment (" " " ")	17	
Motion to make Raleigh H. Daniel a party defendant (omitted in printing)	18	
Order making Raleigh H. Daniel a party defendant	20	6
Judgment	21	7
Opinion, Hill, J.	22	7

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 19, 1927

	Original	Print
Record from superior court of Richmond County	26	11
Bill of exceptions	26	11
Brief of evidence	32	16
Order settling bill of exceptions	53	23
Clerk's certificate (omitted in printing)	54	
Petition	56	23
Exhibit A—"The Augusta Canal"	69	35
Exhibit B—Ordinance to fix the price of water power on Augusta Canal	77	42
Exhibit C—Letter from John U. Myer to Chas. Estes, July 17, 1877	78	42
Exhibit D—Minutes of meeting of council	79	44
Exhibit E—Extract from proceedings of city council	81	45
Exhibit F—Letter from L. T. Blume to Chas. Estes, June 14, 1881	82	45
Exhibits G and H—Minutes of meetings	82	46
Exhibit J—Letter from Charles Estes, July 2, 1881	83	47
Exhibit K—Letter from Charles Estes, November 14, 1881	85	48
Exhibit L—Letter from Charles Estes to R. H. May, March 18, 1882	86	49
Exhibit M—Letter from A. H. Davison to Chas. Estes, May 24, 1882	86	49
Exhibit N—Letter from Chas. Estes to A. H. Davison, May 27, 1882	87	50
Exhibit O—Ordinance to provide for leasing of water power	88	50
Exhibit P—Ordinance to limit time within which present users have right to execute contracts	90	53
Order to show cause	92	54
Demurrer to petition	93	55
Answer	96	57
Amendment to complaint (omitted in printing)	108	
Opinion, Franklin, J.	109	66
Judgment	115	71
Clerk's certificate (omitted in printing)	117	
Statement of points to be relied upon and designation of parts of record to be printed	118	71

[fols. 1 & 2]

IN SUPREME COURT OF GEORGIA

WRIT OF ERROR—Filed July 5, 1927

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Georgia, Greeting:

Because in the record, proceedings and judgment in a cause lately pending in the Supreme Court of the State of Georgia, being the highest court of the said State in which a decision in the cause could be had, between The John P. King Manufacturing Company, plaintiff in error, and The City Council of Augusta and Raleigh H. Daniel, Mayor of the City of Augusta, defendants in error, wherein was drawn in question the validity of a statute of a State, on [fol. 3] the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of its validity;[2] it appears that the said The John P. King Manufacturing Company is entitled to have the said judgment reviewed by the Supreme Court of the United States; and it having presented a petition for a writ of error and an assignment of errors to that end:

And we being willing that error, if any hath occurred, should be duly corrected, and full and speedy justice done to the parties aforesaid, do command you that under your seal, distinctly and openly, you send the record, proceedings and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to

[1] The writ should be directed to the judges of the court of last resort whose judgment is to be reviewed, save where the record has been remitted to and remains in the lower court, in which event the writ may be directed to the judges of the lower court as a means of getting the record. See Atherton v. Fowler, 91 U. S. 143, 146; Sioux Remedy Co. v. Cope, 235 U. S. 197, 200.

[2] If only one of these jurisdictional grounds exists in the case, strike out the other.

correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the fifth day of July, in the year of our Lord one thousand nine hundred and twenty seven.

O. C. Fuller, clerk of the[1] District Court of the United States for the Northern District of Georgia.
(Seal U. S. District Court, N. D. Georgia.)

Allowed by[2] Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.
July 5th, 1927.

[File endorsement omitted.]

[fol. 4] Citation, in usual form, showing service on E. H. Calloway et al., omitted in printing.

[fol. 5] Proof of service of writ of error, filed July 15, 1927, omitted in printing.

[fol. 6] IN SUPREME COURT OF GEORGIA

No. 5624

THE JOHN P. KING MANUFACTURING COMPANY, Plaintiff,

vs.

THE CITY COUNCIL OF AUGUSTA and RALEIGH H. DANIEL, Mayor of the City of Augusta, Defendants

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed July 5, 1927

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the

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[1] The writ may be allowed by the chief justice or presiding judge of the state court whose judgment is to be reviewed or a justice of the Supreme Court of the United States.

[2] The writ may be signed and issued by the clerk of the district court of the United States for that district or the clerk of the Supreme Court of the United States.

above entitled case, the plaintiff hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of the bond.

And the said The John P. King Manufacturing Company assigns the following errors in the records and proceedings of said case.

The validity of the Ordinance of The City Council of Augusta, a municipal corporation under the laws of Georgia, reading as follows, to-wit:

"That from and after the 7th day of March 1926 the rent charges for water power of the Augusta Canal for the ten years beginning March 7, 1926, shall be $11.00 per horse power per year. * * * All industries using power at night shall be charged $3.50 per horse power for such use. * * * The Mayor * * * is authorized, empowered and directed to enter into renewal leases of water power of said Canal with the present users of such power at the rate of $11.00 per horse power per annum * * * and he is hereby clothed with full and complete power and authority to do all things necessary and incident to carrying out the terms of * * * this Ordinance, and he is expressly authorized and empowered to enter into renewal lease or leases of the water power in the Canal to the present users as soon as practicable, and in the name and place and stead of The City Council of Augusta to fully put into effect the terms of the said resolution and provisions of this Ordinance."

as applied to the undisputed facts in the case, was denied and drawn in question by the plaintiff on the ground of its being repugnant to the Constitution of the United States.

And for specific grounds of error The John P. King Manufacturing Company says:

1. That passage of said Ordinance and the enforcing of [fol. 7] the same against the plaintiff's right to use a specified amount of water, say an amount sufficient to supply 1,244.3 horse power, perpetually, from the Augusta Canal, at the rate of $5.50 per horse power per annum, amounts to a violation of Article One, Section Ten of the Constitution of the United States, which provides that "No State

shall * * * pass * * * any law impairing the obligation of contracts."

2. That the judgment of the Supreme Court of Georgia is in violation of Article One, Section Ten of the Constitution of the United States which provides "No State shall * * * pass any * * * law impairing the obligation of contracts" in that it in effect holds valid the aforesaid Ordinance, the enforcement of which Ordinance impairs the obligation of the contract express or implied theretofore arising and existing between the plaintiff and The City Council of Augusta in respect to the right of The John P. King Manufacturing Company to be furnished a specified amount of water power at $5.50 per horse power per annum.

3. That the Supreme Court of Georgia erred in affirming the judgment of the lower Court and in holding that The John P. King Manufacturing Company did not have the right to use water power at the rate of $5.50 per horse power per annum as originally agreed upon with The City Council of Augusta, perpetually, such finding of fact being without evidence to support it and contrary to the undisputed evidence showing that there was a grant by The City Council of Augusta to The John P. King Manufacturing Company, which amounted to a contract for right to use water perpetually at the rate of $5.50 per horse power per annum; such finding of fact results in subjecting The John P. King Manufacturing Company to the terms of said Ordinance, and by reason thereof the passage and enforcement of said Ordinance results in a violation of Article One, Section Ten of the Constitution of the United States, which provides that "No State shall * * * pass any * * * law impairing the obligation of contracts."

[fol. 8] 4. That the enforcement of said Ordinance thereby depriving The John P. King Manufacturing Company of the right to be furnished the specified amount of water at $5.50 per horse power per annum, with all the rights and priorities as heretofore enjoyed by it, would deprive The John P. King Manufacturing Company of "property without due process of law" contrary to the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States.

5. That the judgment of the Supreme Court of Georgia is in violation of Section One of the Fourteenth Amendment of the Constitution of the United States, which provides that no person shall be deprived of "property without due process of law," in that said judgment leaves the City of Augusta free and permits it to enforce said Ordinance, by the terms of which users of water power of the Augusta Canal are required to pay $11.00 per horse power per annum for water so furnished, and thereby deprives The John P. King Manufacturing Company of its property right to have the specified amount of water at the rate of $5.50 per horse power per annum with all the rights and priorities as heretofore enjoyed by it.

6. That the Supreme Court of Georgia erred in affirming the judgment of the lower court thereby leaving the defendants free to deprive The John P. King Manufacturing Company of the specified amount of water at $5.50 per horse power; the effect of which is to permit the defendants by virtue of said Ordinance to deprive The John P. King Manufacturing Company of its property without due process of law contrary to the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States which provides that no State "shall deprive any person of * * * property without due process of law."

For which errors the plaintiff, The John P. King Manufacturing Company, prays that the said judgment of the Supreme Court of the State of Georgia, dated the Thirteenth day of May, 1927, be reversed, and a judgment ren- [fols. 9-19] dered in favor of the plaintiff and for costs.

Bryan Cumming, Cumming & Harper, Attorneys for The John P. King Manufacturing Company.

STATE OF GEORGIA:

SUPREME COURT

Let the writ of error issue upon the execution of a bond by The John P. King Manufacturing Company to The City Council of Augusta and Raleigh H. Daniel, Mayor of the City of Augusta, in the sum of One Thousand Dollars ($1,000.00), such bond when approved in connection with stipulation of parties in the nature of a waiver of super-

sedeas bond filed with the petition for writ of error, shall act as a supersedeas in accordance with the terms of said stipulation.

Dated 5th day of July, 1927.

Richard B. Russell, Chief Justice Supreme Court of Georgia.

[File endorsement omitted.]

[fol. 20] In Supreme Court of Georgia

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

John P. King Mfg. Co.

v.

City Council of Augusta et al.

Order Making Raleigh H. Daniel a Party Defendant—May 13, 1927

The John P. King Manufacturing Company, Plaintiff in Error, having moved that Raleigh H. Daniel, as Mayor of the City of Augusta who is the present incumbent of that office, be made a party Defendant in Error, in lieu and place of William P. White, whose term of office as Mayor of the City of Augusta was terminated by the death of said William P. White, and the Defendants in Error and Raleigh H. Daniel, Mayor of the City of Augusta, having acknowledged service of the motion, and acknowledged the correctness of the facts stated therein, and consented to the motion being acted on without further notice, and to the said Raleigh H. Daniel, Mayor as aforesaid, being made a party as prayed for:

It is, therefore, ordered that Raleigh H. Daniel, as Mayor of the City of Augusta, be and is hereby made party Defendant in Error in the above stated case, in lieu and place of William P. White, Mayor of the City of Augusta.

[fol. 21] IN SUPREME COURT OF GEORGIA

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

JOHN P. KING MFG. CO.

v.

CITY COUNCIL OF AUGUSTA ET AL.

JUDGMENT—May 13, 1927

This case came before this court upon a writ of error from the Superior court of Richmond county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Bill of costs, $15.00.

[fol. 22] IN SUPREME COURT OF GEORGIA

[Title omitted]

OPINION—May 13, 1927

By the COURT:

1. Construing the conversations and correspondence between the City Council of Augusta and the plaintiff, respecting the alleged contract, in the light of the charter powers of the city in acquiring the Augusta canal, and the acts of the parties with reference thereto, a contract to furnish water power by the former to the latter, at a specified rate perpetually, is not made out.

2. The court did not err in refusing an injunction, and in sustaining the demurrer and dismissing the petition.

HILL, J.:

The John P. King Manufacturing Company brought an equitable petition against the City Council of Augusta and Julian M. Smith, mayor, to enjoin the city from en-

forcing an ordinance adopted August 24, 1924, fixing the rate and price of water-power furnished its customers from the Augusta canal, for the period beginning March 7, 1926, and ending March 7, 1936, at $11 per horse-power for day use and $3.50 per horse-power for night use, per annum. The application for injunction applies only to 1244.3 horse power, which the plaintiff claims that it has the right to use in perpetuity at the former rate of $5.50 per horse-power for day use. The 1244.3 horse-power is the amount of power which the plaintiff began to use and take from the canal, according to its petition, on December 1, 1883, upon [fol. 23] the completion of its cotton mill. The plaintiff also prayed for an injunction enjoining the defendants from contracting away to any other person the water-power, or with interfering with the plaintiff's right to the same. A temporary restraining order was granted, and the City Council of Augusta made response by way of demurrer and answer. The case came on to be heard on the petition, demurrer, answer, and evidence submitted by affidavits by the parties. The judge rendered a judgment denying an injunction, and also sustained the demurrer and dismissed the petition. To these judgments the plaintiff excepted.

The controlling question in the case was whether the City of Augusta had theretofore entered into a contract with John P. King Mfg. Co., to supply it with water-power at the specified rate of $5.50 per horse-power per annum in perpetuity, or had made a grant to the plaintiff of the right to have a certain water power for a specified rate, which right, under all the surrounding facts, the city was estopped from withdrawing. It therefore becomes necessary to determine whether, from the allegations of the petition and the evidence, there was a grant or a contract between the parties as to the duration of the contract. The record discloses in substance that the Augusta Canal Company was organized as a private corporation with power to construct a canal and operate the same by furnishing water-power to manufacturing establishments located on or adjacent to the canal, and that the City Council of Augusta under proper legislative authority became the successor in title to all the property and franchises of this private corporation. After

the City of Augusta had thus acquired the Augusta canal properties, the promoters of the John P. King Mfg. Co. made a verbal application to the mayor of the City of Augusta for information as to the terms upon which water-power could be obtained from the Augusta canal. To this [fol. 24] application the then mayor of Augusta replied by letter on July 17, 1877, as follows: "The city council will furnish water-power from the Augusta canal under the usual restrictions to the extent of, say, 2500 horse-power at $5.50 per horse power per annum, payable quarterly." On June 6, 1881, the City Council of Augusta adopted a resolution authorizing the canal committee to grant the application of the John P. King Mfg. Co., and to offer it 1500 horse power of water from the Augusta canal under the usual regulations for its use and at the price then charged other mills, to wit, $5.50 per horse-power per annum; and a copy of this resolution was transmitted to the temporary vice president of the John P. King Mfg. Co. under date of June 14, 1881. On March 18, 1882, the then president of the John P. King Mfg. Co. addressed a letter to the mayor and council of Augusta, the material portions of which are as follows: "Referring to the application of the John P. King Mfg. Co. on June 1, last, for water-power, desire to say that said company is now ready and wishes to enter into a formal contract for the same at your earliest convenience." On May 24, 1882, the city engineer addressed a letter to Charles Estes, then president of the John P. King Mfg. Co. as follows: "I am requested by the mayor and canal committee to ask you to inform them what amount of water you desire to contract for, and that you will notify them immediately of the same." To this communication Charles Estes, president, replied under date of May 27, 1882, as follows: "In reply to yours of the 24th inst., would say that in confirmation of ours of June 1, 1881, and March 18, 1882, that the John P. King Mfg. Co. wishes to contract for so much water per second as will produce on 33 feet head and fall, 1500 horse-power gross, * * * and to commence paying for the same with ordinary diligence on constructing our mill." The John P. King Mfg. Co. was incorporated on May 31, 1881, [fol. 25] for a period of twenty years, with the privilege

of renewal, which was from time to time renewed; and it is alleged that upon the faith of the grant of water-power as set forth above it erected a cotton goods manufacturing plant at a cost of more than one million dollars, and began operations on December 18, 1883, and thereupon began to take from the Augusta canal 1244.3 horse-power, and has continuously from that day to the present time taken and used that amount of horse-power, in addition to other amounts specifically contracted for and not involved in this litigation, and has regularly paid therefor the sum of $5.50 per horse-power per annum.

The plaintiff contends that the foregoing conversations and correspondence between officials of the plaintiff and the City of Augusta, and the action of the plaintiff based thereon, constitute an irrevocable grant by the City of Augusta to the plaintiff to take and use, paying therefor $5.50 per horse-power per annum, water in perpetuity for at least 1244.3 horse-power; and that it also constitutes a contract based upon ample consideration, viz., the inducements held forth by the city, the building and putting into continuous operation a manufacturing plant. There seems to be no material difference between the parties to the present suit as to the foregoing facts, and it is insisted by the plaintiff that the judgment of the court below, in denying an injunction and in dismissing the same, is error. The defendants deny that the facts set forth amounted to a contract, contending that the grant was without mutuality, and that even if a contract existed it could not be construed as a perpetual contract, and that the city has the right after the lapse of years to change or modify the same, so far at least as the rate charged for water is concerned on account of changed conditions and the lapse of time. [fol. 25½] The sole question in this case is whether the John P. King Manufacturing Company has the right to use the water-power at the rate originally agreed upon, perpetually. Construing the conversations and correspondence between the City Council of Augusta and the John P. King Manufacturing Co., respecting the alleged contract, in the light of the charter powers of the city in acquiring and operating the Augusta canal, and the acts of the parties with reference thereto, we are of the opinion

that a contract to furnish water-power at the rates specified perpetually is not made out. In the above view of the case it is not necessary to decide whether or not a quasi public-service corporation can change its rates under a changed condition.

After carefully considering the whole case we are of the opinion that the court did not err in refusing an injunction, or in sustaining the demurrer and dismissing the case.

Judgment affirmed. All the Justices concur.

[fol. 26] Georgia,
Richmond County:

In Superior Court of Richmond County

Bill of Exceptions—Filed August 21, 1926; in Supreme Court August 27, 1926

Be it remembered that the case of The John P. King Manufacturing Company against The City Council of Augusta and Julian M. Smith, Mayor of the City of Augusta, the same being an equitable petition praying for injunction and other relief and filed in the Superior Court of Richmond County, Georiga, came on to be heard in said court before his Honor, A. L. Franklin, Judge of said court presiding, on a response to a rule to show cause why an injunction should not be granted as prayed for.

At said hearing, upon motion of plaintiff, the name of Julian M. Smith as Mayor of the City of Augusta as a party defendant was stricken, his term of office having expired, and William P. White, Mayor of the City of Augusta, was substituted and made a party defendant.

Plaintiff orally moved to strike paragraphs thirty-one and thirty-two of the answer on the ground that the matters therein set up, neither by themselves nor in connection with other allegations of the answer, constitute any defense to the complainant's complaint. The court announced that it would make no ruling at the time but would hear the entire case, reserving its decision on the motion. No judgment was rendered on the motion other than the judgment of August 10th, 1926, denying the injunction. Thereupon

the hearing proceeded upon the complaint and the amendments thereto allowed by the court, the demurrer and answer of the defendants, and the evidence submitted by complainant and defendants, which is set out in a brief of the same approved and identified by the presiding Judge attached to and made a part hereof.

In connection with the introduction of evidence, the plain-[fol. 27] tiff submitted to the court that if its motion to strike paragraphs thirty-one and thirty-two of the answer was sustained, some of its affidavits would be unnecessary, but that they would be introduced subject to the court's ruling on the motion.

Defendants objected to the reading of the affidavits of Smith and Brown on the ground that the evidence therein contained was wholly irrelevant to the issue raised in the answer which was that the charge was a reasonable charge.

Plaintiff objected to all portions of affidavits of Nisbet Wingfield, W. H. Wise and W. W. Hunter in reference to cost of upkeep and capitalization on the ground that it was irrelevant. Also to the portions of the affidavits that gave the witnesses opinions as to reasonableness of new rate and that to sell water at $5.50 per horse-power would amount almost to practical confiscation, on the ground that while the witness could give facts and his opinion as to costs, it was for the court to pass upon the question of reasonableness and confiscation.

Plaintiff objected to the introduction by defendant of Ordinance of March 7, 1886, Sections 236 and 238 (21) of the City's Code of 1898, and Sections 252 and 254 of the City's Code of 1909, on the ground that they were irrelevant, having been adopted subsequent to the arrangement which had previously been made between the City and The King Mill.

The court announced that it would allow the evidence to be read and that the exceptions would be taken into consideration. No rulings were made upon any of the foregoing exceptions to evidence, either of the plaintiff or defendant, except in so far as they might be considered as being ruled upon in the judgment of August 10th, 1926, denying an injunction.

After hearing said evidence and argument of counsel the [fol. 28] Judge took the matter under advisement, and

thereupon upon the tenth day of August, 1926, rendered a judgment denying the injunction prayed for, dissolving the temporary restraining order, and ordering the plaintiff to enter into a contract with the City of Augusta as follows, to wit:

"Therefore it is considered, ordered and adjudged, that the injunction herein prayed for is refused and the temporary restraining order heretofore granted is dissolved. Let the plaintiff enter into a contract as to 1244.3 horsepower of water involved in this litigation upon the same terms and conditions as all other patrons and customers of the canal have executed in pursuance of the ordinance of August 20, 1924.

"This 10th day of August, 1926."

Thereafter the case having come on to be heard before the Hon. A. L. Franklin, Judge as aforesaid, upon defendants' demurrer, after hearing argument, the court did upon the 13th day of August, 1926, sustain the demurrer and dismissed the complaint, to which judgments the plaintiff excepted and now excepts, and assigns the same as error, and for specific grounds of error says:

That said judgment of August 10, 1926, denying an injunction is erroneous because it is contrary to law; and because said judgment, is contrary to the allegations of the petition admitted as true by the defendants, and is contrary to the evidence.

Because said judgment is in violation of Article 1, Section 3, Paragraph 1, of the Constitution of the State of Georgia, which provides that "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid" in that it permits The City Council of Augusta to deprive petitioner of a property right, to wit, the right to be furnished with 1244.3 horse power to be paid for at $5.50 per horse power per annum with all the rights and priorities as heretofore enjoyed by the plaintiff;

Because said judgment is in violation of Article 1, Section 1, Paragraph 3 of the Constitution of the State of Georgia, which prescribes that "no person shall be deprived of life, liberty or property except by due process of law"

in that it permits The City Council of Augusta to deprive petitioner of its property, to-wit: the right to have furnished it by the City of Augusta 1244.3 horse power to be paid for at the rate of $5.50 per horse power per annum, [fol. 29] with all the rights and priorities as heretofore enjoyed by it;

Because said judgment is in violation of Article 1, Section 10 of the Constitution of the United States, which provides that "No State shall * * * pass any * * * law impairing the obligation of contracts in that it in effect holds valid the ordinance of the City of Augusta of August 20, 1924, providing for the leasing of water power of the Augusta Canal for a period of ten years beginning March 7, 1926, and requiring that water power from the Augusta Canal be paid for by all users thereof at the rate of $11.00 per horse power, and the enforcement of said ordinance impairs the obligation of the contract, express or implied, theretofore arising and existing between petitioner and The City Council of Augusta;

Because said judgment is in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States which provides that no person shall be deprived of property "without due process of law" in that said judgment leaves the City of Augusta free to and permits it to, enforce the ordinance of August 20, 1924, by the terms of which users of water power from the Augusta Canal are required to pay $11.00 per horse power per annum for water so furnished and thereby depriving your petitioner of its property right to have water furnished it from the Augusta Canal in the amount of 1244.3 horse power at the rate of $5.50 per horse power per annum with all the rights and priorities as heretofore enjoyed by it.

That the judgment of August 13, 1926, sustaining the demurrer and dismissing petitioner's complaint is erroneous because the same is contrary to law.

Because said judgment is in violation of Article 1, Section 3, Paragraph 1, of the Constitution of the State of Georgia, which provides that "Private property shall not [fol. 30] be taken or damaged for public purposes without just and adequate compensation being first paid" in that it permits The City Council of Augusta to deprive petitioner

of a property right, to-wit, the right to be furnished with 1244.3 horse power to be paid for at $5.50 per horse power per annum with all the rights and priorities as heretofore enjoyed by the plaintiff;

Because said judgment is in violation of Article 1, Section 1, Paragraph 3 of of the Constitution of the State of Georgia which prescribes that "no person shall be deprived of life, liberty or property except by due process of law" in that it permits The City Council of Augusta to deprive petitioner of its property, to-wit; right to have furnished it by the City of Augusta 1,244.3 horse power to be paid for at the rate of $5.50 per horse power per annum, with all the rights and priorities as heretofore enjoyed by it;

Because said judgment is in violation of Article 1, Section 10 of the Constitution of the United States, which provides that "No State shall * * * pass any * * * law impairing the obligation of contracts" in that it in effect holds valid the ordinance of the City of Augusta of August 20, 1924, providing for the leasing of water power of the Augusta Canal for a period of ten years beginning March 7, 1926, and requiring that water power from the Augusta Canal be paid for by all users thereof at the rate of $11.00 per horse power, and the enforcement of said ordinance impairs the obligation of the contract, express or implied, heretofore arising and existing between petitioner and The City Council of Augusta;

Because said judgment is in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States which provides that no person shall be deprived of property "without due process of law" in that said [fol. 31] judgment leaves the City of Augusta free and permits it to enforce the ordinance of August 20, 1924, by the terms of which users of water power from the Augusta Canal are required to pay $11.00 per horse power per annum for water so furnished and thereby depriving your petitioner of its property right to have water furnished it from the Augusta Canal in the amount of 1244.3 horse power at the rate of $5.50 per horse power per annum with all the rights and priorities as heretofore enjoyed by it.

The John P. King Manufacturing Company specifies as material to a clear understanding of the errors complained of the evidence as set out in the exhibit attached to and made a part hereof, and the following parts of the record:

Original petition and the exhibits thereto.
Temporary restraining order.
Demurrer of defendants.
Answer of defendants.
Plaintiff's amendment to petition allowed and filed Feb 26, 1926.
Judgment of the Court refusing the injunction.
Judgment of the court sustaining the demurrer and dismissing the case.

Wherefore, within twenty days of the rendition of the judgments complained of, The John P. King Manufacturing Company presents this its bill of exceptions, and prays that the same may be certified as true and the Clerk of the Superior Court of Richmond County be ordered to make out a transcript of so much of the record as is herein specified and transmit the same, together with this bill of exceptions, and the exhibit thereto, to the Supreme Court of Georgia, in order that the errors herein complained of may be considered and corrected.

Bryan Cumming, Cumming & Harper, Attorneys for the John P. King Manufacturing Co., Plaintiff.

Post Office address of counsel for plaintiff: Marion Building, Augusta, Ga

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[fol. 32] The John P. King Manufacture Co.

vs.

The City Council of Augusta and Julian M. Smith, Mayor of the City of Augusta

Brief of Evidence Introduced under Hearing of the Rule to Show Cause Why an Injunction Should Not be Granted

That The John P. King Manufacturing Company was incorporated as alleged in the petition with privilege of renewal of its corporate powers and privileges, and such corporate powers and privileges had been from time to time renewed, and were now in full force and effect, was agreed to as a true statement of fact by counsel for parties.

LANDON A. THOMAS, by affidavit, sworn for complainant, testified that he was one of the original subscribers to the stock of The John P. King Manufacturing Company at the time of its organization and incorporation; that he became a Director of said corporation in the year 1887 and remained on the Board of Directors until 1901, when he was elected President of the corporation, and he remained President until 1925, and since that date he has been Vice-President of the corporation; that he has been been intimately acquainted with the affairs of the corporation since its organization, and, as far as it is possible for one person to know others motives, he says that the original subscribers to the stock of the corporation were largely interested in becoming stockholders by the fact that power would be furnished to the Manufacturing Company by The City of Augusta at $5.50 per horsepower per annum, and that such grant of power would be in perpetuity as represented by circulars issued at the time stock subscriptions were being solicited, copies of which circulars are attached as Exhibits "J" and "K" to the plaintiff's complaint; [fol. 33] that at the time that the circulars were issued and circulated Charles Estes was temporary Vice-President of the organization, and James P. Verdery temporary secretary. Soon after the organization Charles Estes became President, and until the election of the witness to the Presidency Estes was actively engaged in and about the affairs of the corporation, and was fully informed as to all matters relating to it and its early history. Witness has attached to his affidavit, and refers to, article appearing in The Augusta Evening News, being a daily newspaper having a general circulation in the City of Augusta, the date of the publication of the article being during January or February 1885; that such article sets out the understanding of the then President of the corporation as to the character of the contract with the City of Augusta, and witness, not only from his independent knowledge, but also from information and belief based upon other things, upon said article, and the facts stated to witness by the said Charles Estes, believes, and upon such belief avers, that the obtaining water power at $5.50 per horsepower in perpetuity was one of and a valuable inducement to obtaining subscriptions to the stock of The John P. King Manufacturing Company;

that as additional reasons why witness states that the obtaining water power at $5.50 per horsepower in perpetuity was one of the inducements to obtaining subscriptions, it is within the knowledge of witness that rates of water power in New England at and before the time of obtaining the subscriptions to stock of The John P. King Manufacturing Company were in perpetuity, and were also at as low or lower rates than were being offered by the City of Augusta. Witness also knows that the said Charles Estes and James P. Verdery solicited subscriptions to stock of The John P. King Manufacturing Company among New [fols. 34-37] England capitalists, and witness believes that the statements as to perpetual right to water as set out in the circulars attached as exhibits to the complaint and the belief of Charles Estes as shown in his printed interview, and as directly expressed to witness, were made known to such prospective subscribers to stock. Witness further testified that at the time of the grant of water power to The John P. King Manufacturing Company there was then in existence a contract between The City Council of Augusta and The Augusta Factory to furnish that Company with water power from the Augusta canal at $5.50 per horsepower per annum in perpetuity, and so far as witness knew that was the only express contract then in existence between The City Council of August and power users obtaining water from the Augusta canal, and the promoters of the John P. King Manufacturing Company and its subscribing stockholders were justified in inferring that the grant of water power to The John P. King Manufacturing Company was not only at the same rate and subject to the same regulations as in other instances, but also for the same term.

The copy of the article appearing in The Evening News referred to in the Thomas affidavit was introduced in evidence and was as follows:

" Canal Contracts

* * * * * * *

[fol. 38] Paul H. Dunbar, by affidavit, sworn for complainant, testified that he is Treasurer and General Man-

ager of Clark Milling Company, a corporation located in Augusta, Georgia, and operating a merchant mill at Northwest intersection of McKinne Street and first level of the Augusta canal; that Clark Milling Company is successor in title to John Cunningham in the ownership of the land upon which the Clark Milling Company's mill is located, and of the contract originally made between the Commissioners of the Augusta Canal Company, except in so far as that contract may have been modified by subsequent agreements with The City Council of Augusta, if there are in fact any such modifications; that the deed of conveyance from the Commissioners of Augusta Canal Company to John Cunningham not only conveys the land covering the site of the present mill, but also sets out the terms under which water power was to be furnished the owners of said lot in a covenant and agreement reading as follows:

"And the said Augusta Canal Company, for and in consideration of the sum of Eight hundred dollars ($800.00) per annum by way of annual rent, and payable quarterly, grant unto the said John Cunningham, his heirs, Executors, Administrators, and assigns, in perpetuity, for use on this lot first above mentioned, a sufficiency of water to drive with over shot wheels of best construction eleven feet in [fols. 39-48] diameter with a head and fall of thirteen feet four run of mill stones of four and one half feet in diameter," etc.

That such deed is recorded in Clerk's Office, Richmond Superior Court, Book 2 D, page 390, and that it appears from the grant that it was made in this instance in perpetuity.

[fol. 49] Plaintiff introduced in evidence contract between Augusta Canal Company and The Augusta Factory dated January 1, 1875, the material portions of which are as follows:

"Articles of agreement entered into this first day of January, in the year of our Lord, 1875, between The Augusta Canal Company, as principal, and the City Council of Augusta, as guarantor, party of the first part, and The Augusta Factory, party of the second part.

"Now, therefore, in consideration of the premises and the sum of money hereinafter mentioned to be paid by the

party of the second part as water rent, the said party of [fol. 50] the first part, for themselves, their successors and assigns, covenant, promise and agree, to supply from the first level of their canal East of McKinne Street, in perpetuity from the date hereof, to said party of the second part, their successors and assigns, 577.05 cubic feet of water per second, including therein the 257.48 cubic feet of water per second heretofore granted, making the whole amount of water hereby and heretofore granted 577.05 cubic feet per second as hereinbefore stated, to be used as set forth in the agreements hereinbefore referred to, except as hereinafter modified, and the said Augusta Factory on its part, and its successors and assigns, hereby covenants, promises, and agrees to pay to the said The Augusta Canal Company, their successors and assigns, the sum of $5,480.00 per year forever, in quarterly payments. * * *

"It is further covenanted, promised and agreed between the parties hereto that a horsepower shall be considered as equal to 528 cubic feet of water falling a foot per minute or 8.81 cubic feet of water falling a foot per second."

Plaintiff and defendant both introduced in evidence a deed from the Commissioners of the Canal to the City Council of Augusta, dated July 6, 1876, whereby Augusta Canal Company conveyed to the City Council of Augusta the Augusta canal, its dams, reservoirs, banks, locks, aqueducts, culverts, tow paths, etc., and all the rights, privileges, appurtenances, franchises, ways, and easements belonging or in anywise appertaining thereto, and all the right, title, estate, interest, claim and demand in tracts of land as described in the deed.

Defendant introduced in evidence ordinance of City Council of Augusta dated March 7, 1886, the material portions of which are as follows:

"For twenty years, from March 7, 1886, the rent charge [fol. 51] for water power of the Augusta Canal shall be five dollars and fifty cents ($5.50) per horse power per annum for all mills and factories of every kind. Said sum per horse power shall be paid quarterly, on the first day of January, April, July and October of each year, in advance, to the Collector and Treasurer, or to such other officer as the City Council may designate to receive the same. Said

water shall only be drawn and used between the hours of five o'clock a. m. and nine o'clock p. m. each day, except by the written consent of the Mayor, and subject to such terms and conditions as may be prescribed by the Canal Committee. * * *

"No party shall be entitled to use the water power of the Augusta Canal, except with the consent in writing of the City Council of Augusta, and all water power shall be let and rented only on the following terms, conditions, restrictions and limitations, in addition to those hereinbefore prescribed. The term grantor, used herein, meaning the City Council of Augusta, and the term grantees meaning the parties using or desiring to use said water power: * * *

"No person or corporation shall be entitled to the benefits and conditions of this ordinance until he or it shall enter into a contract with the City Council of Augusta, which contract shall contain the terms of said ordinance."

Defendant introduced in evidence Sections 236 and 238 of the Code of 1898 of the City of Augusta, the material portions of which are as follows:

"For twenty years, from March 7, 1886, the rent charge for water power of the Augusta Canal shall be five dollars and fifty cents ($5.50) per horse power per annum for all mills and factories of every kind. Said sum per horse power shall be paid quarterly, on the first day of January, [fol. 52] April, July and October of each year, in advance, to the Collector and Treasurer. Said water shall only be drawn and used between the hours of five o'clock a. m. and nine o'clock p. m. each day, except by the written consent of the Mayor, and subject to such terms and conditions as may be prescribed by the Canal Committee. * * *

"No party shall be entitled to use the water power of the Canal, except with the consent in writing of Council, and all water power shall be let and rented only on the following terms, conditions, restrictions and limitations, in addition to those hereinbefore prescribed; the term grantor, used herein, meaning Council, and the term grantees meaning the parties using or desiring to use said water power: * * *"

"No person or corporation shall be entitled to said benefits and conditions until he or it shall enter into a contract

with Council which contract shall contain the terms herein contained; * * *"

Defendant introduced in evidence Sections 252 and 254 of the City Code of 1909, the material portions of which are as follows:

"Sec. 252. The rent charged for water power of the Augusta Canal for the twenty (20) years beginning March 7, 1906, shall be five and one-half ($5.50) dollars per horse power per year for all mills electrical plants and factories of every kind; said sum per horse power shall be paid quarterly on the first days of January, April, July and October of each year, in advance, to the Collector and Treasurer. Said water shall only be drawn and used between the hours of five o'clock A. M. and nine o'clock P. M. each day, except with the written consent of the Mayor, and subject to such written terms and conditions as may be prescribed by the Canal Committee; and the horse power furnished industries shall be as per the new measurement, [fol. 53] which went into effect April 1st, 1900; and all industries using water power at night, excepting the Augusta Railway and Electric Company, at the Thompson-Houston Electric Plant, shall be charged $1.75 per horse power for such use." * * *

"No person or corporation shall be entitled to said benefits and conditions until he or it shall enter into a contract with Council which contract shall contain the terms therein contained; * * *"

The foregoing seventeen pages approved as a true brief of evidence introduced at the hearing of the rule nisi in the case of The John P. King Manufacturing Company vs. The City Council of Augusta, in Richmond Superior Court, and are identified as constituting a part of the bill of exceptions certified in said case.

This 21st day of August, 1926.

A. L. Franklin, Judge Superior Court, Richmond County, Georgia.

IN SUPERIOR COURT OF RICHMOND COUNTY

ORDER SETTLING BILL OF EXCEPTIONS

I do certify that the foregoing bill of exceptions is true and contains in connection with the exhibit attached thereto all the evidence, and specifies all of the record material to a clear understanding of the errors complained of, and the Clerk of the Superior Court of Richmond County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the October Term, 1926, of the Supreme Court, that the errors alleged to have been committed may be considered and corrected.

Dated August 21st, 1926.

A. L. Franklin, Judge Superior Court of Richmond County.

[fol. 54] Due and legal service of the foregoing bill of exceptions and writ of error, and copy thereof acknowledged, and all further service waived.

This 21st day of August, 1926.

Archibald Blackshear & Callaway & Howard, Attorneys for the City Council of Augusta. Archibald Blackshear & Callaway & Howard, Attorneys for William P. White, Mayor of the City of Augusta.

Clerk's certificate to foregoing omitted in printing.

[fol. 55] [File endorsement omitted.]

[fol. 56] GEORGIA,
Richmond County:

IN SUPERIOR COURT OF RICHMOND COUNTY

PETITION

To the Superior Court of Richmond County:

The John P. King Manufacturing Company brings this its petition against The City Council of Augusta and Julian

M. Smith, Mayor of the City of Augusta, and respectfully shows:

1. Your petitioner is a corporation organized under the laws of the State of Georgia, with its principal office in the City of Augusta, County of Richmond.

2. The defendant, The City Council of Augusta, is a municipal corporation under the laws of Georgia, located in Richmond County, Georgia, and Julian M. Smith is the duly elected and qualified Mayor of the City of Augusta, residing in Richmond County, Georgia.

3. Your petitioner further shows that by Act approved December 27, 1845, a corporation known as Augusta Canal Company was created by the State of Georgia, authorized and empowered to construct a Canal from a point on the Savannah River above the City of Augusta into and through the City of Augusta, for the purpose of furnishing a supply of water to the City of Augusta for municipal and manufacturing purposes, and said Augusta Canal Company was duly organized under said Act and under the powers contained therein proceeded to construct and did construct a Canal from a point on the Savannah River about seven miles west of the center of Augusta to and through the City limits of Augusta, and put the same into operation for the purposes designed.

4. Your petitioner further shows that thereafter by Act approved in 1849, and also by the Act approved February 7, 1854, The City Council of Augusta was empowered to purchase all the estate, privileges and franchises theretofore granted to the Augusta Canal Company; on May 30, [fol. 57] 1866, the Board of Managers of the Augusta Canal Company passed a resolution that a formal transfer of the canal property be made to the City Council of Augusta; and on December 18, 1968, a further resolution was passed by the Augusta Canal Company directing that the necessary papers be prepared for transferring the Canal Company to The City Council of Augusta, and likewise on said December 18, 1868, the City Council of Augusta passed a resolution directing the Managers of the Canal Company to transfer the Canal to The City Council of Augusta. Thereafter on July 6, 1876, the Board of

Managers of Augusta Canal Company passed a resolution declaring that the entire interest of all the stockholders, except The City Council of Augusta in the Canal and its appurtenances, had been forfeited, and that The City Council of Augusta was the only stockholder in the Canal Company, and directed the President of the Canal Company to execute and deliver to The City Council of Augusta a deed conveying all the Canal property to The City Council of Augusta, and thereafter in pursuance of these resolutions, on July 6, 1876, Augusta Canal Company transferred and conveyed to The City Council of Augusta the Augusta Canal, together with all its property, real and personal and its franchises, by deed recorded in the Clerk's office, Richmond Superior Court, in Book 3 E, p. 358.

5. Your petitioner further shows that the City Council of Augusta having become the sole owner of The Augusta Canal and all of its properties, greatly enlarged said Augusta Canal so as to provide additional water power for manufacturing purposes.

6. Your petitioner further shows that the City Council was desirous of developing the City by inducing the location of manufacturing plants of different kinds in the City, and in pursuance of said policy, upon the 5th day of February 1872 The City Council of Augusta passed an Ordinance reading as follows:

[fol. 58] "That from and after the passage of this Ordinance all capital invested hereafter in the manufacture of cotton yarns or of cotton and woolen fabrics, shall be exempted from taxation for ten years from the time the wheels of such manufacturing establishments shall be started, provided the said manufacturing establishments shall locate within the city limits and derive their power in whole from the waters of the Augusta canal, for which water said mills and manufacturing establishments must pay at the current established rates."

7. In pursuance of the policy referred to in the foregoing paragraph, The City Council of Augusta on February 3, 1873, passed an Ordinance, undertaking to pay a bonus in the nature of a certain percentage of the capital

invested to any person "who shall by negotiation or otherwise bring or cause to be brought capital, which must be the bona fide property of persons residents of cities, towns, villages and counties outside of and beyond the limits of the The City of Augusta and Richmond County, in the sum of six hundred thousand dollars and upwards, and invest or cause to be invested the said capital in real estate buildings and machinery, to be used in the manufacture of cotton, woolen, iron or other goods, on or near the Augusta canal below Rae's creek, using the water power of said canal for driving in whole the machinery of said mills and factories." Said Ordinance was limited to a period of two years, but is indicative of the prevailing policy of The City Council of Augusta toward manufacturing establishments in the period shortly preceding the organization of The John P. King Manufacturing Company and the construction of its manufacturing plant.

8. In 1875 there was published a pamphlet by Bryon Holley, Civil Engineer, entitled "Enlarged Augusta Canal, Augusta, Georgia. Its capacity and advantages for the manufacture of Cotton Goods, with Map of location pre- [fol. 59] pared for publication under the direction of Board of Managers, by Byron Holley, Civil Engineer, 1875." A copy of which is hereto attached marked Exhibit "A". This pamphlet, among other things, stated that the canal was then owned by the City of Augusta and was at that time under the control of the following Board (naming them), who are known as the Board of Managers of the Augusta Canal Company. Subsequent to the publication of this book on April 5, 1880, an Ordinance was passed fixing the price of water power at $5.50 per horse power. A copy of said Ordinance is hereto attached marked Exhibit "B".

9. Your petitioner further shows that with the conditions existing as above stated and with The City Council of Augusta anxious to secure the location of manufacturing establishments in the City of Augusta, to use water from the Augusta Canal, certain citizens of Augusta took steps to organize a company to be known as "The John P. King Manufacturing Company," for the construction and operation of a mill for the manufacture of cotton cloth, to

be located in the City of Augusta, Georgia, and to be operated by water power obtained from the Augusta canal, in accordance with the inducements being held out to investors by The City Council of Augusta, and in pursuance of said plan the late Charles Estes, who was the chairman of the promoters of The John P. King Manufacturing Company, made verbal application to the Honorable John U. Myer, Mayor of the City of Augusta, on the 17th day of July, 1877, in respect to purchasing lands and securing water power for the prospective enterprise, and to this application the said Mayor replied, stating among other things in his letter, that "The City Council will furnish water power from the Augusta Canal under the usual restrictions to the extent of say 2500 horse power at $5.50 per horse power per annum, payable quarterly. A copy of said letter is hereto attached marked Exhibit "C," to which the usual leave of reference is prayed.

[fol. 60] 10. Thereafter, to-wit, in 1881, The John P. King Manufacturing Company made application to The City Council of Augusta for the purchase of a site for its contemplated factory and for the grant of water power, to the amount of 1500 horse power at $5.50 per horse power. Thereafter said application having come on for consideration by The City Council of Augusta, it was referred to the Canal Committee, which Committee made a report to the City Council of Augusta, which report, together with its recommendations, were adopted by the said City Council on the 6th day of June, 1881. A report of said meeting of City Council of Augusta appears in the Daily Chronicle & Constitutionalist, a public gazette then published in Augusta, in its issue of June 7, 1881, a copy of which is hereto attached as Exhibit "D." Said Committee's report recited the application of The John P. King Manufacturing Company to "have put under offer to said Company 1500 horse power of water from the Augusta Canal under the usual regulations for its use, and at the price now charged other mills to-wit: $5.50 per horse power per annum," and said report further recommended that the said petitions be returned to the Canal Committee with power to grant the use of the water as asked at the established rate and under the proper regulations. A copy of said report of the Canal

Committee so adopted by the City Council, is hereto attached marked Exhibit "E," to which the usual leave of reference is prayed. On June 14, 1881, a certified copy of said resolution was transmitted by the Clerk of Council to the Honorable Charles Estes, temporary Vice-President of The John P. King Manufacturing Company. A copy of said letter is hereto attached marked Exhibit "F," to which the usual leave of reference is prayed.

11. The rate of $5.50 per horse power, named to The John P. King Manufacturing Company, was the same as [fol. 61] that at which horse power was being furnished to other manufacturing plants, as in addition to the ordinance of 1880, is evidenced by action of The City Council of Augusta on March 10, 1877, and on December 7, 1877, copies of which resolutions are hereto attached marked Exhibits "G" and "H," to which the usual leave of reference is prayed. The rate per horse power being paid at that time by The Augusta Factory was $5.50 per horse power, as evidenced by the then existing contract between The Augusta Factory and The City Council of Augusta.

12. Your petitioner, The John P. King Manufacturing Company, was incorporated on the 31st day of May, 1881, for a period of twenty years, for the purpose of constructing and operating a cotton manufacturing establishment for the manufacture of cotton goods and cotton yarns, and those interested in the promotion of such enterprise undertook to solicit subscriptions to the capital stock of the corporation, based, among other things, upon the obtaining water power at the rate of $5.50 per horse power. There are attached hereto copies of two circulars issued, the one by the Committee on subscriptions to stock of The John P. King Manufacturing Company, and the other by the Vice-President of the temporary organization, the Honorable Charles Estes; one dated July 2, 1881, the other November 1, 1881, marked respectively Exhibits "J" and "K." Petitioner's charter has from time to time been renewed and is now in full force and effect.

13. Your petitioner further shows that upon the faith of the grant of water power, as hereinbefore set out, it proceeded to erect its cotton goods manufacturing plant at a

cost of more than one million dollars ($1,000,000.00) along the banks of the Augusta Canal, in the City of Augusta, Georgia, and said manufacturing plant was sufficiently completed to begin operations in part on or about the first day of December 1883, and on March 18, 1882, the Honor- [fol. 62] able Charles Estes, then President of your petitioner, addressed a letter to the Honorable R. H. May, Mayor of The City of Augusta, reading as follows:

"Referring to the application of The John P. King Manufacturing Company of June 1, last, for water power, which you so kindly and promptly granted, desire to say that said company is now ready and wishes to enter into formal contract for the same at your earliest convenience."

A copy of said letter is hereby attached marked Exhibit "L", to which the usual leave of reference is prayed.

14. On May 24, 1882, the City Engineer wrote to the then President of The John P. King Manufacturing Company, requesting that he state the amount of horse power desired to contract for. A copy of said letter is hereto attached marked Exhibit "M," to which letter the petitioner's then President, Hon. Charles Estes, replied on May 27, 1882, a copy of which said letter is hereto attached, marked Exhibit "N," to which usual leave of reference is prayed.

15. Your petitioner further shows that in consequence of the negotiations, conferences and exchange of letters and resolutions of The City Council of Augusta, hereinbefore referred to and set out, your petitioner constructed and on December 1st, 1883, put in operation its manufacturing plant adjoining the Augusta Canal, and from that time continuously down to the present, with the exception of short intervals, it has carried on its business of manufacturing cotton goods, and for so doing it secured at the outset a grant of 1,500 horse power, and actually took up the use of 1,244.3 horse power, paying therefor the sum of $5.50 per horse power, and has continued to pay for the same at such rate down to the present time.

16. Your petitioner further shows that so far as its present officers can ascertain or discover, no formal contract [fol. 63] was entered into between your petitioner and The City Council of Augusta in reference to the grant of 1,500

horse power, as arranged for by and under the negotiations hereinbefore set out; but nevertheless following upon said negotiations it built its cotton goods manufacturing plant, was supplied with water pawer, which it took and used and paid for at the rate of $5.50 per horse power to the amount of 1,244.3 horse power, which your petitioner avers was furnished, used and paid for by it under the terms of the aforesaid negotiations, which in themselves constitute a contract between your petitioner and The City Council of Augusta.

17. Your petitioner further shows that on March 4, 1886, The City Council of Augusta for the first time passed an Ordinance, which undertook to provide "That for 20 years the rate charged for water power of the Augusta Canal shall be $5.50 per horse power per annum, for all mills and factories of every kind." Said period of time was thereafter extended to March 7, 1926.

18. Your petitioner further shows that by reason of enlargements of its plant, it required to be furnished with water power in excess of the 1,244.3 horse power, secured in connection with its first operations prior to March 1886, and so from time to time after March 1886 it obtained further and additional grants of water power.

19. Your petitioner concedes that so far as water power granted to and contracted for by it subsequent to March 1886, it is not entitled to use the same at $5.50 per horse power further than the time limit set out in the aforesaid Ordinance, and the extension thereof; but your petitioner avers that there was no limit of time during which its original grant of water power was to be furnished at $5.50 per horse power, and your petitioner further avers that the grant of water power to it at the time of your petitioner's [fol. 64] organization and construction of its original plant, amounting to 1,244.3 horse power at $5.50 per horse power, was and is a grant in perpetuity, and at said price of $5.50 per horse power.

20. Your petitioner further says that the obtaining of $5.50 per horse power was one of the principal considerations which induced your petitioner, its corporators and stockholders, to organize a manufacturing corporation and to construct its manufacturing plant in the City of Augusta,

and The City Council of Augusta having induced your petitioner and its stockholders to invest over a million dollars in a manufacturing plant upon the undertaking that water power would be furnished at $5.50 per horse power, the defendant, The City Council of Augusta, cannot lawfully fail or refuse to continue, as long as your petitioner may require it, to furnish to your petitioner water power to the amount of 1,244.3 horse power at the rate of $5.50 per horse power per annum in perpetuity.

21. Your petitioner further shows that The City Council of Augusta did on the 20th day of August 1924 pass an Ordinance, which in substance provides that on and after the 7th day of March 1926 the amount that would be charged the users of water power from the Augusta Canal shall be for the succeeding ten years $11.00 per horse power. A copy of said Ordinance is hereto attached marked Exhibit "O," to which the usual leave of reference is prayed, and thereafter, to wit: on the 6th day of October 1924 The City Council of Augusta passed another Ordinance fixing the time limit of thirty days in which the present users of water power shall execute contracts with The City Council of Augusta under the provisions of the Ordinance of August 20, 1924, and providing that if the users of water power do not submit to and enter into contracts in accordance with the Ordinance of August 20, 1924, that they will forfeit and lose all rights to secure water from the Augusta Canal. A [fol. 25] copy of said Ordinance is hereto attached marked Exhibit "P", to which the usual leave of reference is prayed.

22. Your petitioner further shows that if it does not enter into the contract prescribed by the Ordinance of August 20, 1924, within the time prescribed by the Ordinance of October 6, 1924, The City Council of Augusta will undertake to treat the right of your petitioner to have furnished it 1244.3 horse power per annum with all the prior rights heretofore enjoyed under its express and implied contract and under the Ordinances of The City Council of Augusta, as forfeited, and the City Council of Augusta will claim the right to dispose of said 1244.3 horse power, together with the prior rights thereto of complainant over other parties, which would be to the irreparable damage of your petitioner.

23. Your petitioner recognizing, upon the passage of the Ordinance of August 20, 1924, and the Ordinance of October 6, 1924, that before it could go into a court of equity asking relief of such court, it should itself do equity, has, therefore, accepted the provisions of the two aforesaid Ordinances in respect to the water power granted it subsequently to the Ordinance of March 7, 1886 to the amount of 1683.8 horse power, and has executed with The City Council of Augusta a contract for that amount of water-power to be furnished under the terms of said Ordinance, reserving to itself, however, the right to insist upon being furnished 1244.3 horse power at the rate of $5.50 per horse power, under the same rights of priority thereto as heretofore, and your petitioner still in furtherance of its obligation to do equity, and in view of the fact that its investment is so located that it is absolutely necessary that it have the aforesaid 1244.3 horse power, with the priorities heretofore enjoyed, while protesting and claiming that it is en-[fol. 66] titled to still receive said horse power at the rate of $5.50 per annum per horse power, now pledges itself that if it should be adjudged in a final decree in this cause that it is not entitled to receive 1244.3 horse power at $5.50 per horse power per annum, it will then execute the contract as required under the provisions of the Ordinance of August 1924, The City Council of Augusta by this undertaking not losing an opportunity to have said 1244.3 horse power contracted for at the rate of $11.00 per horse power per annum, if it should be adjudged and decreed that your petitioner is not entitled to continue to receive the same under the same terms and conditions and costs as heretofore.

24. Your petitioner further shows that the effort of The City Council of Augusta to deprive your petitioner of 1244.3 horse power, to be paid for at $5.50 per horse power per annum, with all the rights and priorities as heretofore enjoyed by it, would be depriving your petitioner of a property right, without paying your petitioner any adequate or just compensation for the same, and would be in violation of Article 1, Section 3, Paragraph 1 of the Constitution of the State of Georgia, which provides that "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."

25. Your petitioner further says that the effort of The City Council of Augusta to deprive your petitioner of 1244.3 horse power, to be paid for at the rate of $5.50 per horse power per annum, with all the rights and priorities as heretofore enjoyed by it, would be in violation of Article 1, Section 1, paragraph 3 of the Constitution of the State of Georgia, which prescribes that "No person shall be deprived of life, liberty or property except by due process of law."

26. Your petitioner further shows that the effort of The [fol. 67] City Council of Augusta to deprive your petitioner of 1244.3 horse power, to be paid for at $5.50 per horse power per annum, with all the rights and priorities as heretofore enjoyed by it, would be in violation of Article 1, Section 10, of the Constitution of the United States, which provides that "No State shall pass any law impairing the obligation of contracts," for that the passage of the Ordinances hereinbefore referred to and the effort to enforce the same would amount to the passing of a law impairing the obligation of the contract between petitioner and the City Council of Augusta.

27. Your petitioner further shows that the effort of The City Council of Augusta, by the passage of the Ordinances of August 24, 1924 and of October 6, 1924, hereinbefore referred to, to deprive your petitioner of 1244.3 horse power, to be paid for at $5.50 per horse power per annum, with all the rights and priorities as heretofore enjoyed by it, would be to deprive your petitioner of "property without due process of law, contrary to the provisions of the 14th amendment, Section 1, of the Constitution of the United States.

28. Your petitioner further shows that the damage which would result to your petitioner from depriving it of the supply of water power would be irreparable, and would not be susceptible of computation, and could not be adequately compensated for by a money verdict.

29. Your petitioner further shows that it has no adequate remedy at law to protect itself against the threatened wrong.

Wherefore, discovery being waived, your petitioner prays that the City Council of Augusta and Julian M. Smith, Mayor, make answer hereto, and that they be perpetually enjoined from interfering with your petitioner taking and receiving from the Augusta Canal water to the amount of 1244.3 horse power, to be paid for by your petitioner at [fol. 68] the rate of $5.50 per annum, with the same priorities, obligations and privileges as said water has heretofore been furnished, and taken by your petitioner.

That the City Council of Augusta and the Mayor thereof be enjoined and restrained from withholding from your petitioner the water necessary to furnish the horse power aforesaid at the price and under the terms as heretofore the same was furnished;

That The City Council of Augusta, and the Mayor thereof, be enjoined from contracting away to any other person or corporation the 1244.3 horse power per annum heretofore furnished to, taken and paid for by your petitioner, as hereinbefore described, or contracting away or interfering with petitioner's priorities to said water as heretofore.

30. Your petitioner further prays that if it should be finally adjudged and decreed that the contentions of your petitioner are wrong, that The City Council of Augusta, and the Mayor thereof, still be enjoined from contracting away said water power heretofore furnished petitioner in the manner hereinbefore described, and/or the priorities heretofore enjoyed, until your petitioner can in the exercise of reasonable diligence execute with The City Council of Augusta a contract to be furnished with said 1244.3 horse power at the price and under the terms of the Ordinance of August 24, 1924, with such rights of priority as to the use of said horse power among other users of water from the Augusta Canal as heretofore enjoyed by your petitioner, and that in the meantime a temporary restraining order be issued requiring the said City Council of Augusta, and Julian M. Smith, Mayor of the City of Augusta, to show cause, if any they can, why the injunction and other relief prayed for in this petition, should not be granted, and that such other relief be afforded your petitioner as to the [fol. 69] court shall seem equitable and proper, and that

process do issue requiring the defendants to be and appear at the January Term, 1925 of this Honorable Court to answer your petitioner's complaint.

Cumming & Harper, Petitioner's Attorneys.

Exhibit A to Petition

The Augusta Canal

The Augusta Canal was projected by a few public-spirited citizens of the City of Augusta, prominent among whom may be mentioned the late Col. H. H. Cumming, the late W. M. D'Antignac, and the Hon. John P. King.

These gentlemen, with six others, were elected by the City Council of Augusta a Board of Commissioners, "For the purpose of constructing a canal from a point in the Savannah River about seven miles above, to the City of Augusta, for manufacturing purposes, and for the better securing an abundant supply of water to the city."

The work was commenced in 1845, and completed in the early part of 1847.

The dimensions were 40 feet surface in width, 20 feet bottom, and 5 feet deep, affording a total mechanical effect of about 600 horse powers.

It soon became evident that the canal was too small to supply the demand for power, and the increasing demand for fire, domestic and other purposes consequent upon the growth of the city. Temporary expedients were devised and carried into effect from time to time in order to increase the supply, and after the banks of the canal had been raised so as to furnish 7 feet depth of water, its ultimate capacity was reached, and yet the quantity furnished was entirely inadequate to supply the demand.

[fol. 70] Under these circumstances, the enlargement of the canal to its present dimensions was decided upon, and in March, 1872, the work was commenced, and is now, July, 1875, practically completed.

Its dimensions and capacity are as follows:

Length of main canal or first level, 7 miles; and including second and third levels, 9 miles. Minimum water way, 150

feet at surface, 106 feet at bottom, and 11 feet deep, making an area of cross-section of 1,408 square feet.

The bulk-head, locks, dam and other structures are composed of stone masonry formed of granite rock laid up in hydraulic cement mortar, and are of the most substantial character. The area of openings for the supply of the canal amounts to 1,463 square feet, and the entire waters of the Savannah River are made available for maintaining the supply. There are about 275 acres of reservoirs exclusive of the canal proper, and the pond above the bulk-head and dam. There is a bottom grade or descent in the main canal of one hundredth of a foot in 100 feet, giving a theoretical mean velocity of 2-74/100 feet per second, or a mechanical effect under the minimum fall between the first and third levels, or between the first level and the Savannah River below Rae's Creek, of upwards of 14,000 horse powers, not including available supply from the surface of the reservoirs.

Of this immense power but 1,900 horse-powers are contracted for, as follows:

Augusta Factory,	1,000	horse-powers.	
Russell & Simmons Factory,	90	horse-powers	Conditional.
Southern Cross "	25	" "	
Gray's Cotton "	80	" "	conditional.
Granite Mills (Flouring),	125	" "	
Augusta Mills "	127	" "	
Excelsior " "	80	" "	
Paragon " "	100	" "	conditional.

[fol. 71] Miller's Mills (Flouring), 75 horse-powers.

Schley's Mills (Flouring),	100	horse-powers	conditional.
Dixon Fertilizer Co.,	25	" "	
Pendleton & Boardman Mach. W'ks.,	10	" "	
Tobacco Factory	15	" "	
City Pump,	50	" "	

leaving at least 12,000 horse-powers to be disposed of.

The canal is owned by the City of Augusta, and is at present under the control of the following Board:

Hon. Charles Estes, President, John U. Meyer, Thos. G. Barrett, Alexander Philip, M. E. Hill, who are known as the Board of Managers of the Augusta Canal Company.

The said Board of Managers, for the purpose of giving information concerning their water power, and the facilities for using it, and to make known the Specifications and Regulations under which they propose to sell or lease the water, have issued this pamphlet and the accompanying map.

Hereafter, the Company propose to lease water only from the first level to Hawk's Gully and the river.

On the first level the Company own from Thomas Heckels' line to Rae's Creek, a distance of nearly a mile. This tract has been divided into two tiers of water lots, most eligibly located for using water. Parallel with the canal and adjacent thereto is a street, seventy feet wide including the towing path of the canal. Four hundred feet from this it is proposed to lay out another street parallel thereto, between which and the river there will be a tier of lots, upon which water can be used and discharged with very little cost directly into the river.

The Company also own, on the opposite side of the canal, a tract of land extending from the Washington Road nearly to Rae's Creek, containing ninety acres, exceedingly well located for the erection of dwellings for the use of operatives. This land will be sold to lessees of water power at very low rates.

[fol. 72] To give uniformity to the operations of the Company, and to guard the interests of both parties, the Specifications, Rules and Regulations following, have been adopted, and will compose a part of the lease conveying the water to grantee.

Specifications

First. The water shall be drawn through a bulk-head to be constructed under the directions of the grantors of their agent, by and at the cost of the grantees, who shall forever keep the same in good repair at their own cost and charge.

Second. No building shall be erected on the premises now owned by the Canal Company, between the first level and the Savannah River, from Rae's Creek to West Boundary Street, within 70 feet of the water in the canal, which 70 feet shall be reserved for a highway and towing path; and

the water granted to the grantees shall be conveyed from the bulk-head aforesaid through iron or wooden cylinders, at such depth below the surface of the towing path and highway, as shall be directed by the grantors.

Third. The gates of the bulk-head aforesaid shall be at all times under the control of the grantors, or their agent or agents. There shall be no leaks through the bulk-head or cylinders. Should any leaks occur in any of the structures through which the water is conveyed to the water wheels, the same shall be stopped by the grantees immediately upon being notified thereof.

Fourth. The tail-races shall be so constructed as to be accessible at all times, and in such form and size as will convey the water from the wheels without piling or backing up above the outlet so as to give a greater fall in said tail-race than five one-hundredths of a foot in one hundred feet, and the bottom and sides of said tail-race shall be smooth and even.

[fol. 73] Rules and Regulations

First. The grantors reserve to themselves the right to enter at all times upon the said premises, for the purpose of inspecting the bulk-head, cylinders, forbays, flumes, water wheels, water gates, tail-races, and every other structure connected with the hydraulic power.

Second. The grantors reserve the right to measure at any time the quantity of water which shall be used by the grantees, either in tail-races, or in the Canal above the bulk-head, or in both.

Third. The amount of power used by the grantees shall be determined by multiplying the whole fall of the water from the surface of the canal whence it is drawn, to the surface of the water in the tail-race, as it would be if constructed in accordance with the fourth specification above written, by the quantity discharged per minute, and dividing the product by the divisor 528, and the quotient will be the number of horse-powers.

Fourth. If overshot or breast wheels are used by the grantees, cast iron gauges shall be fixed at the water gates,

to the wheels, and the size of these gauges shall be determined as follows, viz: The quantity of water per second necessary to give the amount of power granted shall be ascertained by the third rule; then the said quantity is to be divided by the product of the square root of the head of water above the middle of the apperture, and the multiplier, 5,0125, and the quotient will be the area of the gauge in square feet, from which the form of the aperture may be fixed to suit the local circumstances.

The thickness of said gauge shall not exceed one inch, and no plank or wood shall be within three inches of the edges of the aperture which forms the gauge. If turbine water wheels are used, the issues, of the wheel shall be the gauge, and the aggregate areas of said issues shall be fixed according to the head of water in the tail-race [fol. 74] as follows, viz: The square root of the said head shall be multiplied by 5,0125 and the ascertained quantity, according to the third rule above written, divided by the product.

Fifth. In case the aggregate issues of any turbine wheel, or of any number of turbine wheels, in use by the grantees, shall exceed the area or areas necessary to furnish the quantity of water granted, as ascertained by the third rule aforesaid, then the grantees shall pay for such excess at the rate of fifteen dollars per horse-power, until the said aggregate areas are reduced to the sum which shall belong to the grantees, as the same shall be determined by the rules hereinbefore and hereinafter mentioned.

Sixth. When the quantity of water necessary to give the power granted is to be ascertained, the words "head and fall" are understood to mean the whole distance from the surface of the water in the canal, whence the water is drawn, to the surface of the water in the tail-races. But in no case shall the head and fall be taken at less than the head and fall named in the ninth section herein following; and when the quantity of water which the gauges and issues aforesaid will discharge is to be ascertained, then the word "head" is the distance from the surface of the water in the canal, whence the water is drawn, to the middle line of said gauges and issues, or to the surface of water in tail-race, according to the circumstances.

Seventh. The grant of power is forever to be subject to all prior grants made by the grantors, and to the natural and providential changes in the river, the grantors not intending to grant anything beyond the capabilities of their dam at the head of the canal, in Savannah River, and the canal known as the Augusta Canal, both of which they are hereby bound to maintain; but should the grantors neglect [fol. 75] and refuse to keep said dam and canal in good repair, so that the waters of the Savannah River are not conveyed to the grantees in quantity fulfilling the capabilities of said dam and canal, then, and in that case, the grantees may, after a notice of thirty days, proceed to put said dam and canal in the condition required to give them, the said grantees, the water due under their grant, and may collect by suit at law, all the cost and charges which shall accrue in putting said dam and canal in such condition.

Eighth. A horse-power is hereby defined to be 528 cubic feet of water falling one foot per minute.

Ninth. In ascertaining the amount of power used at any time by the grantees, all water used within two hundred feet of said canal shall be computed to have at least — feet head and fall; and all water used between two hundred and seven hundred feet of said canal shall be computed to have at least — feet head and fall; and all water used between seven hundred feet from said canal and the Savannah River shall be computed to have at least — feet head and fall.

Tenth. It shall be lawful for the grantees to use an increased quantity of water when the water from said river is flush, and backs up in the tail-races; such increase shall be only sufficient to keep the amount of power up to the number of horse-powers granted; but this can only be done by the use of additional wheels, to be used only when the river is higher than the tail-race.

Eleventh. The "surface of the canal" mentioned in these regulations is understood to be the established surface water-line as hereinafter described; and if at any time the water shall not be kept up to said line, and it shall be found by the grantors impossible to maintain that line, and give to all the grantees of the Augusta Canal Company the power

[fol. 76] granted to them, then, and in that case, it shall be lawful for the grantors to establish a different surface water-line at a lower elevation, and the grantees shall be entitled to draw an increased quantity of water, sufficient to give them the power granted.

Twelfth. The established surface water-line in the Augusta canal is to be an inclined plane, having the spill or weir of the structure known as "Rae's Creek Waste Weir" for its summit; from thence it is to fall at the rate of one hundredth of a foot in one hundred feet to the lower end of the canal. Below this line the water is not expected to fall, but the plan is to permit the water to fluctuate above the line, so that at the Augusta Mills the water will rise at times two feet higher that this line.

Thirteenth. The grantors hereby reserve the right to draw the water from said Canal at any time when they deem it necessary to clear out obstructions in said Canal, and when repairs and improvements to any part of said Canal are deemed necessary, without being liable for damages to the grantees, any further than the amount of water-rent during the time the water is so drawn off.

For desirability of location and unfailing supply of water, this power is unsurpassed upon the continent. Its location in the heart of the cotton raising region, and at one of the most important inland markets for the staple in the country, together with the even temperature and healthfulness of the climate, the moderate cost of living and the abundance of labor, renders it peculiarly adapted to the profitable manufacture of cotton goods, as is evidenced in the success of the Augusta, Graniteville, and other factories in this immediate vicinity.

Perhaps no city of its size at the South enjoys the same immunity from malarious diseases as does the City of Augusta; in fact, its bills of mortality will compare favorably [fol. 77] with the most favored cities in the land. Its streets are broad and airy, a perfect system of drainage has been inaugurated, its police and fire depart-s are effective; and its people are energetic, progressive and hospitable. It is well supplied with school and church accom-

modations, and its society is first-class in every respect. As a place of winter resort for people in pursuit of health or pleasure, the city of Augusta and its immediate vicinity has a national reputation.

With all these assured advantages, the Board of Managers would respectfully invite a critical examination of their power by capitalists who are seeking profitable investments.

All communications should be addressed to the Board of Managers of the Augusta Canal, Augusta, Ga.

Exhibit B to Petition

An Ordinance to Fix the Price of Water Power on the Augusta Canal

Section I. Be it ordained by the City Council of Augusta, and it is hereby ordained by the Authority of the same, That from and after the passage of this Ordinance the rates for horse power for water on the Augusta Canal shall be five dollars and fifty cents for mills of any and all kinds to be contracted for as at present required.

Section II. And be it further ordained, that so much of Ordinances and parts of Ordinances as conflict with this ordinance be and the same are hereby repealed.

Done in Council this 5th day of April A. D., 1880.

[fol. 78] Exhibit "C" to Petition

Mayor's Office

Augusta, Ga., July 17th, 1877.

Chas. Estes, Esq.

Dear Sir: Referring to our conversation of this morning, in relation to the erection of a large Cotton Factory on the Powder Mill Tract, just above Harrisburg and the City, I will state that I am satisfied that the City Council will sell it to any bona fide Company at say ($100.00) One Hundred Dollars per acre for the land (27 acres) and ($5.00)

five dollars per thousand for the brick that is or may be on the ground at the time of the organization of the Company.

I should think there would be, say One Million, or more, of Brick, besides the smoke stack, which is (160 ft.) One hundred and sixty feet high, containing (490,000) Four Hundred and Ninety Thousand Brick, said stack to remain standing (but subject to use as a smoke stack).

Titles to the aforesaid Property to be made whenever a bona fide Company is organized and satisfactory assurance given that a Cotton Factory for (50,000) Fifty Thousand spindles will be erected on the aforesaid Tract; and that (10,000) Ten Thousand of said spindles shall be in operation and running in (15) months from the date of titles; (10,000) Ten Thousand additional in (2 yrs.) two years more; and the remaining (30,000) Thirty Thousand spindles in three (3 yrs.) years from said date.

The City Council will furnish water Power from the Augusta Canal, under the usual restrictions to the extent of, say (2,500) Twenty-five hundred horse power at ($5.50) Five dollars and fifty cents per horse power, per annum, payable quarterly.

The aforesaid Tract of land has a front on the Canal of about Fourteen (1400) ft. hundred feet, extending back to the Savannah River, say (1,000) One Thousand Feet, on which it fronts about (700 ft.) seven hundred feet; on the [fol. 79] Western side it has a natural Race or Stream, through which the water can be discharged; and the location of the Mill would have the advantage of a good hard material for Foundations for buildings and a cheap wheel pit.

The City owns (67) Sexty-seven acres, on the opposite side of the canal, suitable for operatives' houses, which could be had at a reasonable price—(say (10) Ten acres of it).

For (10 yrs.) Ten Years the Property of the Company, by a law of this State is free from State, County or City Taxes.

Yours truly, John U. Myer, Mayor.

Attest: L. T. Blume, Clerk of Council. (Seal City of Augusta.)

EXHIBIT "D" TO PETITION

The Daily Chronicle & Constitutionalist

Augusta, Ga., Tuesday, June 7, 1881.

Regular monthly meeting of Council held Monday afternoon at 3 o'clock.

The Canal Committee and the committee of the whole recommend that the petition of W. E. McCoy and The John P. King Mfg. Co. for water power be granted at the established rate and under the proper regulations, and to sell the land desired at $100 per acre. Mr. Bennett moved to amend by letting the water power at $5.50 per horse power for ten years, and not be increased beyond $10.00 after that time.

After some discussion, Mr. Bennett moved that so much of the report as relative to the sale of land be adopted, and so much of it as refers to the water power be not acted [fol. 80] upon now.

Mr. Young said he supposed that Mr. Bennett meant to take in all the factories and not legislate for this alone. Why not, then, bring it up properly under the head of resolutions and ordinances.

Mr. Myers thought it best to refer it back to the committee. Mr. Evans said if this resolution of Mr. Bennett went before the public it would act as a damper upon the King Mfg. Co., for which $160,000 subscriptions had that day been received.

The Mayor thought it would be best to adopt the report as a whole. They could afterwards pass an ordinance referring to all the factories.

Mr. Thompson said he had seconded Mr. Bennett's motion simply to get the question before Council.

The previous question was called for and carried. The original resolution adopting the report was then put and carried. Mr. Bennett voting, nay.

Resolutions, Orders, and Ordinances

By Mr. Bennett: Resolved, that the Canal Committee be instructed to make no contracts for water power for a longer term than ten years at the present rate of $5.50

per horse power, and agreeing that at no time thereafter shall the rate exceed $10.00.

There was no second to the resolution.

[fol. 81] EXHIBIT "E" TO PETITION

(Extract from the Proceedings of the City Council of Augusta, Georgia, of June 6th, 1881)

The Canal Committee, to whom was Referred the Petitions of the John P. King Manufacturing Company asking Council to "put under offer for a reasonable time, for a site for the contemplated Factory the tract of land bought by the City of the Starnes' Estate. Bounded by Rae's Creek, the River on the North-east, the Henry Tract on the East, and the Canal on the South-west, containing about Forty Acres, "asking also, that the price be named; and also, to "have put under offer" to "said Company, (1,500) "Fifteen Hundred Horses Power of Water from the Augusta Canal, under the usual regulations for its use, and at the Price now charged other Mills—to-wit: $5.50 per Horse Power per annum, "respectfully report: That they recommend, that the said Petitions, and others, be returned to the Canal Committee with power to grant the use of the water as asked, at the established rate and under the proper Regulations; and with power to sell the land desired at one hundred Dollars per Acre.

The Report and Recommendations were Adopted.

A true extract from the Minutes of Council of June 6th, 1881.

[fol. 82] EXHIBIT "F" TO PETITION

Copy of Letter from the Clerk of Council, Augusta, Georgia, Dated June 14th, 1881

Hon. Chas. Estes, Temporary Vice-President John P. King Mfg. Co.

DEAR SIR: I herewith send you certified copy of the action of the City Council of Augusta in regard to your petitions for land and water for your proposed factory.

I am instructed by the Mayor to said that land on the opposite side of the canal will be also put under offer to your company for operatives's houses, at the price of $100.00 per acre, the same as paid by other factories on the canal.

Very respectfully, (Signed) by L. T. Blum, Clerk of Council.

Exhibit "G" to Petition

Extract from Minutes of Council

Page 415

March 10th, 1877.

By Mr. Stovall: Whereas an application has been made to purchase a portion of the Power Mill tract on the Canal for manufacturing purposes.

Therefore be it

Resolved, That his Hon. the Mayor and Canal Committee be authorized to sell such portion of said tract and upon such terms as may be agreed upon by them.

Be it further resolved, That they be also authorized to furnish the water power at the same rate per Horse Power as is now paid by the Augusta Factory.

Adopted.

[fol. 83] Exhibit "H" to Petition

Dec. 7th, 1877.

Mr. Stovall from the Canal Committee Reported That the Committee recommend Granting the Petition (of John M. Clark & Co.,) and that all Mills be placed upon the same footing as to Rate of Horse Power, on and — January 1st, 1878. On Motion of Mr. O'Donnell Received and Adopted.

(Extract from Minutes of above vote.)

L. T. Blume, C. C.

Minutes of Council Dec. 3/77, Page 484.

EXHIBIT "J" TO PETITION

Augusta, Ga., July 2, 1881.

DEAR SIR: Permit us call your attention to an enterprise which we believe will prove a most profitable investment.

We propose erecting at Augusta, Ga., at an early a day as practicable, a Brick Cotton Mill, to be called "The John P. King Manufacturing Company," with a capital of $1,000,000—two hundred thousand of which shall be reserved for commercial capital, and in no event expended for any other purpose. To this end we have already obtained a charter most liberal in its terms and free from personal liability, and effected a temporary organization June 1st, 1881, by the election of John P. King Temporary President, for many years President of the Georgia Rail Road; Charles Estes, Temporary Vice-President; and James P. Verdery, Temporary Secretary.

The main structure will be about 550 feet long, 80 feet wide, and four stories high, and when completed to contain about 30,000 spindles and 900 Looms, together with all necessary out-buildings.

[fol. 84] We intend to manufacture Standard Sheetings, Drills, Colored Plaids and Yarns.

The Mill will be built on the Augusta Canal (one of the finest water powers in the Southern States), immediately on the line of the Augusta & Knoxville Rail Road, and we have now the city's proposition to furnish us with as much water power as we may need at the very low price of $5.50 per horse power in perpetuity.

For manufacturing cotton fabrics Augusta is perhaps the most favorably located city in the South. Her numerous rail roads, cheap water power, climate peculiarly adapted for manufacturing cotton, and excellent class of operatives, certainly give this city decided advantage over any other; besides all this the raw material is grown at the very doors of her mills.

It is well known and the annual reports show it, that factories in Augusta have for the past fifteen years earned and are still earning from 12 to 25 per cent. per annum net, and there is reasonable certainty that this mill with the advantage of modern machinery and improvements, will

do equally as well. The citizens of Augusta have shown their appreciation of the enterprise by already subscribing over $300,000 of the capital required. The stock is divided into shares of $100 each, and will be called for in installments of about 10 per cent. per month, after permanent organization next fall.

Should you desire to invest in the stock of this company, a prompt reply will oblige,

Respectfully and truly yours, Charles Estes, J. P. Verdery, Committee on Subscription.

At ——.

[fol. 85] EXHIBIT "K" TO PETITION

Augusta, Ga., November 14th, 1881.

DEAR SIR: Permit us to call your attention to the opportunity now offered of taking stock in "The John P. King Manufacturing Company" at Augusta, Georgia, with a capital of $1,000,000.—$825,000 of which is already subscribed and the remainder ($175,000.) is yet to be taken. The amounts already subscribed are about equally divided between the North and those made in Georgia.

We have a charter liberal in its terms and free from personal liability. Have effected a temporary organization by the election of Hon. John P. King, President; Chas. Estes, Vice President, and Jas. P. Verdery, Secretary.

The main structure will be of brick, say 500 feet long by 80 foot wide, four stories high; when completed to contain about 30,000 spindles and 900 looms. It is intended to manufacture standard sheeting, shirting, colored plaids, and yarns.

The mill will be located on the immediate line of the Augusta and Knoxville Railroad, outside the city limits, on the Augusta canal (one of the best water-powers in the South). We have the city's proposition to furnish as much water-power as needed at the very low price of $5.50 per horse-power per annum in perpetuity. Augusta is perhaps the most favorably located city in the South for manufacturing cotton fabrics. Her numerous railroads, cheap water-power, climate peculiarly adapted, excellent class of

operatives, and large cotton supplies, are certainly great advantages.

With all modern machinery and the latest improvements, with an abundance of good and cheap labor, we hazard little in saying that the King Mill will start under as favorable circumstances as any mill in the country, and with a fair share of good management promises to do well for its stock holders.

[fol. 86] The stock is divided into shares of $100 each, and will be called for in installments of about ten per cent. only as needed, after permanent organization.

Should you desire to take any of the remaining stock of the company, please address the undersigned.

Respectfully and truly yours, Chas. Estes, Augusta, Ga.

EXHIBIT "L" TO PETITION

The John P. King Manufacturing Company

Augusta, Ga., March 18th, 1882.

Hon. R. H. May, Mayor, and the City Council.

GENTLEMEN: Referring to the application The John P. King Manufacturing Company" of June 1st last for water power, which you so kindly and promptly granted. Desire to say that said company is now ready and wish to enter into formal contract for the same at your earliest convenience.

Very respectfully and truly yours, Chas. Estes, Presdt.

EXHIBIT "M" TO PETITION

Augusta Canal

Augusta, Ga., May 24th, 1882.

Chas. Estes, Esq., Pres. King Mills.

DEAR SIR: I am requested by the Mayor & Canal Committee to ask you to inform them what amount of water

you desire to contract for and that you will notify them immediately of the same.

I also call your attention to section 6; last 4 lines of sect. 9; and sec. 14 in proposals enclosed. In stating the [fol. 87] requisite number of Horse Power be specific as to whether you mean gross or nett horse power.

Respectfully, A. H. Davison, Engr.

Exhibit "N" to Petition

The John P. King Manufacturing Co.

Augusta, Ga., May 27, 1882.

Mr. A. H. Davidson, Engineer Augusta Canal.

Dear Sir: In reply to yours of the 24th inst. would say, That in confirmation of ours of June 1st, 1881, and Mch. 18, 1882, That "The Jno. P. King Manfg. & Co." wish to contract for so much water per second as will produce on (33) thirty three feet head and fall (1500) fifteen hundred Horse power. Gross or in other words to make it more clear we wish to contract for (400) four hundred cubic feet of water per second on that fall to be so used when the established canal level is raised to that point and to be used on the level as now established say thirty and a half feet fall producing on the last named fall (1386 36/100) thirteen hundred and eighty-six 36/100 Horse power, Gross and to commence paying for the same with ordinary diligence in constructing our mill.

Respectfully yours, Chas. Estes, Prest.

[fol. 88] Exhibit "O" to Petition

An ordinance to provide for the leasing of water power of the Augusta Canal for a period of ten (10) years beginning March 7th, 1926; to provide for a creation of a fund for the development of the water power of said canal into hydro-electric energy; to provide the terms of such lease or leases; to amend section 252 of the City Code of 1909, and for other purposes.

Whereas, in regular meeting assembled, The City Council of Augusta did on the 7th day of April, 1924, adopt the following Resolution;

Resolved by The City Council of Augusta that the proposed plan submitted by the Mayor for renewing the leases of water power on the Canal at the expiration of the present leases, and that the net proceeds thereof be used as an additional fund for retiring the bonded indebtedness of the City, so as to enable the City, as early as possible, to develop the unused water power in the Canal, be, and the same is, hereby approved.

Resolved further, that the City Attorney be and he is, hereby authorized to promptly prepare a proper ordinance authorizing the renewal of the leases of the water power in the Canal to the present users, at a rate of $11.00 per horse power, and to insert in such ordinance the proposed recommendation by the Mayor that the net proceeds arising from such rental be applied as an additional fund toward retiring the City's present bonded indebtedness, and that the City Attorney is further instructed to prepare contracts with the present water power users in accordance with the provisions of said ordinance, and that said ordinance further contain a provision giving the present water power users a reasonable limitation of time in which to execute the same.

Said recommendation and message are attached to this ordinance and made a part thereof:

[fol. 89] Now, therefore, the City Council of Augusta hereby ordains:

Section 1. That from and after the 7th day of March, 1926, the rent charged for water power of the Augusta Canal for the ten (10) years beginning March 7th, 1926, shall be eleven ($11.00) dollars per horse power per year. All mills, electric plants and factories of every kind, and all other users of such water power under the same terms, conditions, restrictions, and limitations, specified and provided in Section 252 of the City Code of 1909 and the following sections of said Code pertinent thereto. All industries using power at night shall be charged $3.50 per horse power for such use.

Section 2. Be it further ordained by the authority aforesaid that the Mayor be, and he is, hereby authorized, empowered and directed to enter into renewal leases of water power of said Canal with the present users of such power

at the rate of $11.00 per horse power per annum, which said lease shall contain the stipulations, terms, restrictions and limitations now provided in Section 252 et sequitur of the City Code of 1909, and in addition to such provision said lease shall also contain a covenant and agreement on the part of the City Council of Augusta to set aside the entire net proceeds from the operations of the Canal, arising from rentals of water power or otherwise, a fund to be known as the Canal fund, which fund shall be expended only for the purpose of paying off and retiring the present bonded indebtedness of the City of Augusta.

Section 3. Be it further ordained by the authority aforesaid that the Mayor be, and he is, hereby clothed with full and complete power and authority to do all things necessary and incident to carrying out the terms of said Resolution adopted April 7th, 1924, and this Ordinance, and he is expressly authorized and empowered to enter into renewal [fol. 90] lease or leases of the water power in the Canal to the present users as soon as practicable, and in the name and place and stead of The City Council of Augusta to fully put into effect the terms of the said Resolution and the provisions of this Ordinance.

Section 4. All Ordinances and parts of Ordinances in conflict herewith are hereby repealed.

Done in Open Council under the Common Seal thereof, this 19th day of August, A. D. 1924.

Approved this 20th day of August, A. D., 1924.

J. M. Smith, Mayor, C. A.

Attest: J. W. Westmoreland, Clerk of Council.

Exhibit "P" to Petition

An ordinance to be entitled "An ordinance to limit the time within which the present users of water from the Augusta Canal shall have the right to execute contracts with the city in accordance with the provisions of the ordinance approved August 20th, 1924, fixing the price per horse-power for the use of said water after March 7th, 1926, and for other purposes."

Section 1. Be it ordained by the City Council of Augusta, that the present users of water power from the Augusta Canal shall have thirty days from the date of this ordinance in which to execute contracts with the City of Augusta in accordance with the provisions of the Ordinance approved August 20th, 1924, at the rate of $11.00 per horse power for the period of ten years, dating from March 7th, 1926.

Section 2. Be it further ordained by the authority afore- [fol. 91] said, that on and after thirty days from the date of this Ordinance, all present users of water power from the Augusta Canal which shall have failed to execute contracts with the City under the provisions of said Ordinance approved August 20th, 1924, at the rates and for the period of ten years, beginning March 7th, 1926, as provided in said Ordinance, shall lose all rights of priority, as they now exist, as to the use of said water in said Canal for the ten year period beginning March 7th, 1926, and the City shall have the right on and after said period of thirty days from the date of this Ordinance to make such disposition of the water power in said Canal not already contracted for during said ten year period covered by said Ordinance, as the Mayor and City Council shall deem to be for the best interest of the City.

Section 3. Be it further ordained, that all ordinances and parts of ordinances in conflict with this ordinance, be, and they are, hereby repealed.

Duly sworn to by Landon A. Thomas. Jurat omitted in printing.

[fol. 92] In Superior Court of Richmond County

Order to Show Cause—Filed October 31, 1924

The foregoing petition read and considered:

Ordered that the defendants, The City Council of Augusta, and Julian M. Smith, Mayor thereof, show cause before me on the 14th day of November 1924, at the court house in Augusta, Georgia, why the injunction and relief prayed for in the foregoing petition should not be granted.

Further ordered that in the meantime and until the further order of the court The City Council of Augusta and Julian M. Smith as Mayor be and they are hereby enjoined and restrained from contracting away to any other person or corporation 1,244.3 horse power heretofore furnished The John P. King Manufacturing Company, or in any way depriving The John P. King Manufacturing Company of said water power, and the right to have the same upon the terms and in the manner and under the priorities heretofore furnished it.

Further ordered that the defendants be served instanter with a copy of the petition and of this order.

This 31st day of October, 1924.

A. L. Franklin, J. S. C. A. C.

[File endorsement omitted.]

Due and legal service of the within petition & order acknowledged, filing, copy, process & copy process and all further service waived. This 31st day of October, 1924.

The City Council of Augusta and Julian M. Smith, Mayor of the City of Augusta, by J. M. Smith, Mayor, C. A.

[fol. 93] IN SUPERIOR COURT OF RICHMOND COUNTY

JOHN P. KING MANUFACTURING CO.

vs.

THE CITY COUNCIL OF AUGUSTA and JULIAN M. SMITH, Mayor

DEMURRER TO PETITION—Filed March 4, 1925

Now come the defendants in the above stated cause, at the Appearance Term thereof, and demur to the Plaintiff's petition upon the following grounds:

1. That said petition sets forth no legal or equitable cause of action.

2. That under the facts stated in said petition, the plaintiff is not legally or equitably entitled to any of the relief prayed for.

3. That under the facts set forth in said petition there was no contractual agreement on the part of The City Council of Augusta to furnish water to plaintiff at a price of $5.50 per horse power in perpetuity, as contended for in said petition.

4. Because under the 7th Section of the Act Approved December 27th, 1845, referred to in plaintiff's petition, incorporating the Ausgusta Canal Company, it was expressly provided "That the Board of Managers for the time being, shall have power to make and enforce such rules and regulations in relation to the use of said Canal and its water, for navigation, or other purposes, and to impose and collect such tolls, rent, or other charges as they may deem equitable or expedient, and which do not interfere with any of the existing contracts or obligations of said company."

And under the Act of the Legislature Approved December 19th, 1849, referred to in plaintiff's petition as authorizing the City Council of Augusta to purchase and take over said Canal, in Section 2 thereof it was expressly pro-

[fol. 94] vided that upon such purchase and conveyance, The City Council of Augusta should be vested with all of the power, authority and privileges conferred on said com-

1. Defendants admit the allegations of paragraph 1 of plaintiff's petition.

2. Defendants admit the allegations of paragraph 2 of plaintiff's petition.

3. Defendants admit the allegations of paragraph 3 of plaintiff's petition, and in further answer thereto say that by the Act of December 27th, 1845 incorporating the Augusta Canal Company, in the 7th Section thereof, it was expressly provided as follows:

"That the Board of Managers for the time being shall have power to make and enforce such rules and regulations in relation to the use of said canal and its water for navigation and other purposes, and impose and collect such tolls, rent, or other charges as they may deem equitable or expedient, and which do not interfere with any of the existing contracts or obligations of said company."

4. Defendants admit the allegations of paragraph 4, and for further answer thereto say that by the 2nd section of the Act of December 19th, 1849, referred to in said paragraph, authorizing the transfer and conveyance of the property and effects of said Canal Company to the City Council of Augusta, it was expressly provided "that upon such purchase and conveyance the City Council of Augusta shall be vested with all the power, authority and privileges conferred on said company by the Act incorporating it, and shall be subject to all the liabilities therein prescribed.

[fol. 97] 5. The allegations of paragraph 5 of said petition are admitted.

6. The allegations of paragraph 6 of plaintiff's petition are admitted, and for further answer thereto defendants say that the language used in the Ordinance of February 5th, 1872 quoted in said paragraph, clearly imported a meaning and intent on the part of the City Council of Augusta to reserve the right to change the tolls and rents to be charged and collected for the use of water power from said canal from time to time, as the management of said canal might determine, in accordance with the express provisions of the Act of 1845 hereinbefore referred to incorporating said Canal Company.

7. The allegations of paragraph 7 of said petition are admitted, but further answering the same, defendants deny that said act on the part of said City Council of Augusta, and the language used in said ordinances, can be construed as in any manner fixing any rate of rent or charges for water power from said canal as the rate to be applied in perpetuity, or that City Council could have legally changed the organic law of said corporation as contained in the act of incorporation by any mere ordinance inconsistent with the terms thereof.

8. Defendants admit the allegations of paragraph 8 of plaintiff's petition, but deny that the pamphlet referred to therein, copy of which is attached as Exhibit "A" to plaintiff's petition, contains any expression or language which could be construed as an intention on the part of the City Council of Augusta to fix a rate for the revenues from water power from said canal, in perpetuity, or a rate not subject to change, from time to time, as the conditions might change, and as might seem to the management of the canal for the time being to be equitable or expedient.

[fol. 98] That the ordinance adopted by the City Council of Augusta on April 5th, 1880, copy of which is attached as Exhibit "B" to plaintiff's petition, fixing the rate per horse power for water from the Augusta Canal, at $5.50 per horse power, in meaning and effect amounted to nothing more than the fixing of the current rate to be charged for said horse power for the time being, and contains no language which indicates that the said rate was to be a rate in perpetuity. That any other construction of the meaning and intent of said ordinance would make the same inconsistent with and contradictory to the express terms of the original act of 1845 incorporating the Canal Company.

9. The allegations of paragraph 9 of plaintiff's petition are admitted, and further answering the same defendants say that the rate referred to therein of $5.50 per horse power per annum, and as set forth in said letter from the then Mayor of the City of Augusta, copy of which is attached as Exhibit "C" to plaintiff's petition, when read in connection with the language of the Act of 1845 incorporating said Canal Company, hereinbefore quoted, cannot be construed as an attempt to contract for said water power at a rate

of $5.50 per horse power in perpetuity, and if such was an attempt to make such a contract in perpetuity, the same was void as being inconsistent with the language of said act incorporating said Canal Company, and also was ultra vires on the part of said John U. Myer, as Mayor of the City of Augusta, and was without legal authority.

10. The allegations of paragraph 10 of plaintiff's petition are admitted, but defendants deny that the allegations therein, or in the exhibits referred to therein, contain any language which can be construed as a contract on the part of the City Council of Augusta to furnish water from said Canal to the plaintiff at $5.50 per horse power, as a contract in perpetuity at said rate.

[fol. 99] 11. The allegations of fact in paragraph 11 of plaintiff's petition are admitted, but defendants, in answer to said paragraph, deny that said acts, or any of them, referred to therein or set forth in exhibits referred to therein, contain any language indicating any intention on the part of the City Council of Augusta to enter into any contract for the rate to be charged for water power from said Canal, in perpetuity, and deny that the effect of said acts was to create a contract at said rate in perpetuity, and say that should said construction be placed upon any of said acts as attempting to create a contract in perpetuity at a rate of $5.50 per horse power, the same would have been in violation of law and such contract would have been wanting in mutuality, and a unilateral contract, for the reason that neither the plaintiff nor any of the other parties referred to therein, directly nor indirectly, made any promise, or entered into any contract or agreement, or bound themselves to take and pay for said water at said rate in perpetuity.

12. For answer to paragraph 12 of the plaintiff's petition defendants admit that the plaintiff was incorporated on the 31st day of May 1881 for a period of twenty years, but for the want of sufficient information can neither admit nor deny the allegations in said paragraph in reference to the alleged copies of two circulars issued as in said paragraph referred to,—copies of which are attached as exhibits "J" and "K" to plaintiff's petition; and further

answering said paragraph in reference to said circulars, defendants say that as said alleged circulars were issued by parties other than the City Council of Augusta and other than any officer, agent or representative of the City Council of Augusta, the statements contained in said circulars were in no manner binding upon the City Council of Augusta, and formed no part of any contract or agreement between [fol. 100] the plaintiff or its promoters or officers and the City Council of Augusta, and has no legal or binding effect on the City Council of Augusta as to the alleged contract for the use of said water power.

13. The allegations of paragraph 13 are admitted, but further answering the same defendants say that while said letter, copy of which is attached to said petition as Exhibit "L", stated that the plaintiff company was then ready and desired to enter into a formal contract for the use of water power from the canal, said petition does not show that the plaintiff company ever entered into any contract other than by the actual use of water and the payment of the rent, toll and charges therefor according to the current rates prevailing at the time.

14. For answer to paragraph 14, defendants admit the facts as therein stated, but deny that either the letter of the City Engineer, copy of which is attached as Exhibit "M" to plaintiff's petition, or the reply of Charles Estes, copy of which is attached as Exhibit "N" to plaintiff's petition, constitutes any contract, or that said letters aid in establishing the existence of a contract for the use of water power from said canal at other than the current rates as the same might be deemed equitable and expedient by the management of said canal, from time to time, as set forth in the original act incorporating said Canal Company.

15. The allegations of fact in paragraph 15 are admitted, and for further answer thereto defendants deny that said conduct and acts on the part of the plaintiff as in said paragraph set forth, conferred upon plaintiff anything more than a vested right to obtain water power from said Canal as long as it might carry on and continue the operation of its plant as a manufacturing plant, and as long as it continued as a customer of the City Council of Augusta for

the use of said water power and was willing to pay, and [fol. 101] offered to pay, at the usual current, fixed prices charged for said water power.

16. For answer to paragraph 16 the defendants admit the facts as set forth in paragraph 16 of plaintiff's petition, but deny that said conduct and acts as therein alleged, constituted any contract in perpetuity on the part of plaintiff to obtain water power from said canal at $5.50 per horse power, and only entitled plaintiff, as long as it continued its manufacturing plant and the operation thereof, to obtain water power from said Canal at the current rate which might be in existence and established for the time being.

17. For answer to paragraph 17 defendants admit the allegations of fact as therein stated, but deny that said act or conduct on the part of the City Council of Augusta had any legal effect in changing the power and rights of the City Council of Augusta in operating the said canal as a public utility, to fix or change the rates, tolls and rents for water power from said Canal from time to time as it might deem equitable or expedient.

18. Defendants admit the allegations of paragraph 18 of plaintiff's petition.

19. The allegation of paragraph 19, conceding that the grant of water power from said canal by the City Council of Augusta after the Ordinance of March, 1886 was subject to change from time to time, is a mere concession in plaintiff's conclusions, but defendants deny the conclusions of the pleader in the remaining allegations of said paragraph that there was no express limit of time during which the original grant of water power to be furnished at $5.50 per horse power, and that the said grant of 1244.3 horse power at the rate of $5.50 per horse power was a grant in perpetuity at said price, and allege that the conduct and acts of plaintiff and the City Council of Augusta as to the [fol. 102] original grant, and use of said original 1244.3 horse power, constituted a contract between plaintiff and the City Council of Augusta only by implication of law, as no express contract was ever entered into between said parties for the use of said water power. That the power reserved to the owners and operators of said canal in the

original act of incorporation, expressly reserving the right to fix and change the rate for the use of said water power from time to time as the management of said canal might deem to be expedient and equitable, by necessary implication, constituted a part of the alleged contract between the plaintiff and the City Council of Augusta.

Further answering said paragraph defendants say that there could be no legal contract between the plaintiff and the City Council of Augusta for the use of water power at $5.50 per horse power in perpetuity without the express obligation on the part of plaintiff to take and pay for said water power at said price, in perpetuity, and there is no such obligation, express or implied, in any of the acts or transactions referred to, which show any such promise or undertaking on the part of the plaintiff, and said alleged contract by implication as a contract in perpetuity, is wanting in mutuality, is a unilateral contract, and void in law.

20. For answer to paragraph 20 of plaintiff's petition defendants deny the allegations thereof and deny the conclusions of the pleader as therein stated, and deny that the acts of the City Council of Augusta, or the acts of plaintiff and City Council of Augusta as therein referred to, constituted a contract on the part of the City Council of Augusta to furnish plaintiff water power to the amount of 1244.3 horse power, at the rate of $5.50 per horse power per annum, in perpetuity. Further answering said paragraph, defendants allege that the facts as set forth in plaintiff's petition and relied upon by plaintiff as constituting such a [fol. 103] contract, do not, in law, constitute a contract in perpetuity, and such an alleged contract would be void as wanting in mutuality, and a unilateral contract, which would be void and unenforcible in law.

21. The allegations of paragraph 21 are admitted, and defendants allege that they had the legal right to adopt said ordinance and to enforce the same.

22. For answer to the allegations of paragraph 22 defendants admit that unless the plaintiff will enter into the contract as prescribed by the ordinance of August 20th, 1924 as to the use of the 1244.3 horse power from said canal as in said paragraph referred to, defendants will have

the right, under said ordinance, to dispose of said water power to other users, and if the plaintiff is damaged thereby, it will be its own fault in failing to execute said contract as prescribed in said ordinance of August 20th, 1924, and without wrong or injury on the part of these defendants.

23. For answer to the allegations of paragraph 23, defendants admit the facts therein and further answering said paragraph defendants allege that if, upon the final determination of this cause, when the legal and equitable rights of the plaintiff and defendants have been finally determined and adjudicated, it shall be held that plaintiff is not entitled to the use of said 1244.3 horse power from said canal at the price of $5.50 per horse power, in perpetuity, that if plaintiff shall then promptly enter into a contract as provided for under the terms of the ordinance of August 20th, 1924, these defendants will promptly execute the same, and the plaintiff will suffer no injury.

24. The allegations of paragraph 24 are denied.

25. The allegations of paragraph 25 of plaintiff's petition are denied.

26. The allegations of paragraph 26 of plaintiff's peti- [fol. 194] tion are denied.

27. The allegations of paragraph 27 of plaintiff's petition are denied.

28. The allegations of paragraph 28 of plaintiff's petition are denied, and if the plaintiff will execute the contract provided for in said ordinance of August 20th, 1924, it will suffer no damages.

29. The allegations of paragraph 29 of plaintiff's petition are denied.

30. Further answering plaintiff's petition these defendants say that practically all of the other users of water power from said canal have promptly executed contracts as provided for and in accordance with the terms of the ordinance of August 20th, 1924, and if these defendants are required either to execute a contract or permit the plaintiff to use water power from said canal after the 7th, of March, 1926, at a rate of $5.50 per horse power as claimed

by the plaintiff in its said petition, while all other users of water power from said canal are paying the new rate of $11.00 per horse power for the use thereof, the same will be a discrimination against the other users of said water power and will force the defendants in the operation of a public utility power plant to practice an illegal discrimination against its customers, all of which is contrary to, and in violation of, the public policy and the laws of said State in such matters.

31. For further answer to plaintiff's petition these defendants say that the cost and expense of operating and maintaining and keeping said canal in condition to furnish water power to the various customers of the City Council of Augusta, is very much more expensive at the present time, and will be during the period of ten years from March 7th, 1926, the period covered by said ordinance of August 20th, 1924, than such cost and expense of main- [fol. 105] tenance has been during the past, and these defendants, as the owner and operator of a public utility which is required to serve its customers to the extent of its capacity, are equitably and legally entitled to adjust the rates and charges for said water power to meet the present conditions and to enable it to continue to furnish said power from said canal as a source.

32. Further answering said petition defendants say that the price or rate of $11.00 per horse power as fixed under the ordinance of August 20th, 1924, for a period of ten years from March 7th, 1926, is not only a reasonable charge and rate for said horse power, but is less than half the price or rate per horse power which plaintiff and other users of power from said canal would be required to pay for the power necessary to operate their plants from any source, either by electricity, steam power, or otherwise and said price of $11.00 per horse power for said period is not only reasonable, but expedient and equitable to plaintiff and the other users thereof.

Wherefore, defendants pray that the relief prayed for in plaintiff's petition be denied, and that it be held that defendant has the right, from time to time, to fix the charges

for horse power from said canal as a public utility, and to require its patrons, including plaintiff, to use the same in accordance with such just and fair regulations, and at such reasonable and equitable rates and charges as may be fixed therefor by the City Council of Augusta from time to time, as by law it is authorized to do.

Archibald Blackshear, City Attorney, E. H. Calloway, Special Attorney, Attorneys for Defendant.

[fols. 106-108] [File endorsement omitted.]

Duly sworn to by Wm. P. White. Jurat omitted in printing.

[fol. 109] In Superior Court of Richmond County

[Title omitted]

Opinion

For forty years prior to 1924, The John P. King Manufacturing Company had been buying and paying for water furnished by The City Council of Augusta at the rate of $5.50 per horse power. On August 20, 1924, The City Council of Augusta passed an ordinance, fixing the rate and price of water power furnished its customers at $11.00 per horse power. Whereupon The John P. King Manufacturing Company brought this suit against The City Council of Augusta to restrain the City from enforcing said ordinance fixing the rate and price of water power furnished The John P. King Manufacturing Company at $11.00 per horse power. The application for the restraining order applies only as to 1244.3 horse power, which the plaintiff claims that it has the right to use in perpetuity at the former rate of $5.50 per horse power for day use. This case now comes up on a rule nisi. It was fully argued by both sides, and the Court held up its decision until this day. The only question for determination here is, when the John P. King Manufacturing Company was organized and its plant erected did there exist between The City Council of Augusta and The John P. King Manufacturing Company a contract in perpetuity to furnish the said John P. King

Manufacturing Company 1244.3 horse power at $5.50 per horse power. In determining, from the pleading and evidence, whether there existed between the parties a contract in perpetuity to furnish water at $5.50 per horse power, it must be borne in mind that "the law of the place where the contract is entered into at the time of making the same is as much a part of the contract as though it were expressed or referred to therein."—13 Corpus Juris, page [fol. 110] 560; 49 Ga., 152; 73 Ga., 751. So, what was the law of the place at the time the plaintiff contends that the evidence shows a contract in perpetuity was entered into between plaintiff and defendant. The act of the legislature authorizing and creating the Canal Commission, was passed in 1849, and the act expressly reserved to the Manager of the Canal the right and power to fix and change the rates for power, service, etc., from time to time. The act of the legislature authorizing The City Council of Augusta to take over the Canal expressly conferred these same rights on The City Council of Augusta. On the 5th day of February, 1872, The City Council of Augusta passed an ordinance which provided, among other things, that "manufacturing establishments must pay (for water) at the current established rates." On the 5th day of April, 1880, an ordinance was passed by The City Council of Augusta, fixing the water rate for all mills at $5.50 per horse power, "to be contracted for as at present required." On June 6th, 1881, the Canal Committee made a report of its recommendations to The City Council of Augusta, which recommendations and report were adopted by said body, which was as follows:

"The Canal Committee, to whom was Referred the Petitions of The John P. King Manufacturing Company asking Council to "out under offer for a reasonable time, for a site for the contemplated Factory the tract of Land bought by the City of the Starnes' Estate. Bounded by Rae's Creek, the River on the Northeast, the Henry Tract on the East, and the Canal on the Southwest, containing about Forty Acres, "asking also, that the price be named; and also, to "have put under offer" to "said Company (1,500) "Fifteen Hundred Horses Power of Water from the Augusta Canal, under the usual regulations for its use,

and at the price now charged other Mills; to-wit: $5.50 per Horse Power per annum, "respectfully report: That they recommend, that the said Petitions, and others, be returned to the Canal Committee with power to grant the [fol. 111] use of the water as asked, at the established rate and under the proper Regulations; and with power to sell the land desired at one hundred dollars per acre."

All the implications of law seem to be against any contract in perpetuity as to price per horse power, or that the time the Mill should be furnished water at a given price would be forever, because the original act incorporating the Canal Commission in expressly conferring the right upon the Commission to fix the rates and prices for the time being, as well as the ordinance of 1872, requiring the mills and manufacturing establishments to pay at the current established rates, all indicate that the rates were to be changed from time to time, and any person taking water power from the Canal under such circumstances would necessarily take it subject to these rights to change the rate on the part of the City Council of Augusta. In the absence of an express contract, courts will not presume any contract as being in perpetuity. On July 2nd, 1881, and November 14, 1881, circulars were sent out by Mr. Charles Estes and Mr. Eugene Verdery, promoters of The John P. King Manufacturing Company, in which they stated that they now had from the City of Augusta a proposition to furnish them water in perpetuity at the rate of $5.50 per horse power. On March 4th, 1886, The City Council of Augusta passed an ordinance, fixing the rate or price per horse power for water from the Canal for a period of twenty years at $5.50 per horse power. The higher courts have held that to construe a contract to be one in perpetuity, it must be plain, clear and unequivocally expressed. The plaintiff expressly admits in paragraph 16 of its petition that it has no formal contract with The City Council of Augusta entitling it to said 1,244.3 horse power at a rate of $5.50 per horse power in perpetuity, but it contends that the negotiations, under the pleadings and evidence, carried on between the City [fol. 112] Council of Augusta and the promoters of The John P. King Manufacturing Company, whereby it built its plant on the banks of the Canal, for the purpose of using said water power from the Canal as its motive power was

at a time when the current rate was $5.50 per horse power, and that it amounts to a contract in perpetuity at such rate. The plaintiff contends, furthermore, that from all the facts and circumstances attending the erection of the plant of the John P. King Manufacturing Company and the correspondence carried on at that time between the City Council of Augusta and the promoters of The John P. King Manufacturing Company, constituted a contract in perpetuity for water to be furnished by The City Council of Augusta at the rate of $5.50 per horse power. If this case can proceed at all, it must do so on the theory that the pleadings and evidence show and set up a contract in perpetuity between The City Council of Augusta and The John P. King Manufacturing Company to furnish and accept water as motive power of the mill at the rate of $5.50 per horse power. The only evidence in this case tending to show a contract in perpetuity is found contained in two circulars sent out in 1881 to prospective investors by the promoters of the John P. King Manufacturing Company, in which they say, "We now have from the City a proposition to furnish us all the water we need at the rate of $5.50 per horse power in perpetuity." In none of the correspondence, set out in the petition, between the City and the John P. King Manufacturing Company, does there appear any intimation that the water to be used by The John P. King Manufacturing Company was to be taken by it in perpetuity. If there was a proposition from the City to furnish water to The John P. King Manufacturing Company in perpetuity at the rate of $5.50 per horse power, there is nothing in the evidence which shows that the proposition [fol. 113] was ever accepted by The John P. King Manufacturing Company for such duration and rate, neither is there any evidence tending to show that The John P. King Manufacturing Company ever intended to accept the water at such rate for such length of time. So that, assuming that The City Council of Augusta made such a proposition to The John P. King Manufacturing Company, there is no evidence tending to show, nor is it contended by the plaintiff, that The John P. King Manufacturing Company entered into such an agreement to take and pay for the water in perpetuity. Therefore, if such proposition was made by The City Council of Augusta to The John P. King Manufacturing Company to furnish a given amount

of water at $5.50 per horse power in perpetuity and there was no agreement upon the part of The John P. King Manufacturing Company to accept and pay for such amount of water at such rate in perpetuity, it would be a unilateral contract and unenforcible. Suppose The John P. King Manufacturing Company tomorrow were to decide that it would use no more water from the City Canal but would operate its mill by electricity, is there any evidence in this case, when most liberally construed, by which The City Council of Augusta could compel The John P. King Manufacturing Company to take and pay for its water at $5.50 per horse power in perpetuity. There is neither a line nor an intimation of such evidence. If that be true, The City Council of Augusta could not be compelled to furnish to The John P. King Manufacturing Company water at $5.50 per horse power forever. If the John P. King Manufacturing Company had no written contract with The City Council of Augusta to furnish it water in a given amount in perpetuity at $5.50 per horse power, but it considered from the circumstances and negotiations attending and carried on between them concerning the erection of its manufacturing plant, constituted a contract in perpetuity, the [fol. 114] court is unable to see why, when The City Council of Augusta in 1880 passed an ordinance fixing the water rate for all mills at $5.50 per horse power and fixed the time limit in which the mills should have that water at such a rate, the John P. King Manufacturing Company did not come in and at least make some objection or protest to The City Council of Augusta fixing the time limit at twenty years, in which the water could be used at such a rate by the mills. Instead of that, The John P. King Manufacturing Company went on using the water in the face of said ordinance, which fixed the time limit at twenty years, and which was renewed at the expiration of that time, and used the water for twenty years more, and all in that time no effort was made to establish a formal contract in perpetuity in the courts until The City Council of Augusta by ordinance in 1924 raised the water rate from $5.50 per horse power to $11.00. But after all is said and done, it is exceedingly doubtful, as an original proposition, whether a municipality ever has the power and authority to enter into a contract in perpetuity, even when it is unequivocally expressed.—126 G., 651.

Therefore, it is considered, ordered and adjudged that the injunction herein prayed for is refused and the temporary restraining order heretofore granted is dissolved. Let the plaintiff enter into a contract as to 1,244.3 horse power of water involved in this litigation upon the same terms and conditions as all of the other patrons and customers of The Canal have executed in pursuance of the Ordinance of August 20, 1924.

This 10th day of August, 1926.

A. L. Franklin, J. S. C. A. C.

[fols. 115-117] In Superior Court of Richmond County

Judgment

The Court having on August 10th, 1926 rendered a decision in the within stated case refusing the injunction prayed for, and the case coming on to be heard upon the Defendants Demurrer; after argument the within Demurrer is hereby sustained and the plaintiff's petition is hereby dismissed.

This August 13th, 1926.

A. L. Franklin, J. S. C. A. C.

[fol. 118] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed—Filed July 20, 1927

1. In view of the pleadings and evidence a Federal question was involved in the judgment of the court below, even though the court based its judgment apparently solely on the ground that it found as a fact that there was no contract between the plaintiff and The City Council of Augusta, nor grant from The City Council of Augusta to plaintiff, as claimed by plaintiff in its bill of complaint, for that such finding against the contention of plaintiff as to the existence of a contract gave effect to the Ordinance of The City Council of Augusta, which Ordinance impaired

the obligation of the alleged contract, and deprived plaintiff of its property without due process of law.

2. Writ of error is the proper method to review the judgment of the court below because there was drawn in question the validity of an Ordinance of The City Council of Augusta, and an Ordinance of a municipal corporation is within the meaning of the words "statute of any state" in the Act of Congress providing for review by the Supreme Court under writs of error of judgments of a State Court where is drawn in question the validity of a statute of any state.

3. That the power of the Supreme Court to determine whether or not there has been legislation impairing the obligation of a contract imposes on the court the duty to ascertain whether under the facts of the case there is a contract and its import, even though the Supreme Court of Georgia has decided that there had never been a contract as alleged and contended by plaintiff.

4. That a valid contract had been made, entered into, and is in existence between The City Council of Augusta, and The John P. King Manufacturing Company, under which the Manufacturing Company was entitled to be furnished by The City Council of Augusta in perpetuity with water power in the amount of 1,244.3 horsepower from the City's canal at the rate of $5.50 per horsepower per annum.

5. That the conversations and letters between the promoters, organizers, and officials of The John P. King Manufacturing Company, on the one hand, and The City Council of Augusta, and its officers, on the other, in the light of and in connection with the Ordinance and Resolutions of the City, circulars, prospectuses, and the building and [fol. 119] operating of plaintiff's manufacturing plant, and all other attendant and preceding circumstances, if not constituting an express contract, amounted to an implied contract between parties that The John P. King Manufacturing Company would be entitled to obtain from the City's canal the specified amount of water power at the rate of $5.50 per horsepower per annum in perpetuity.

6. That the making of such a contract was within the powers of The City Council of Augusta.

7. That the passage of the Ordinance set out as an exhibit to the bill of complaint providing that thereafter the charge for water power should be $11.00 per horsepower per annum was the passage of a law impairing the obligation of the existing contract within the meaning of the constitutional provision prohibiting a State from passing any law impairing the obligation of contracts.

8. That The City Council of Augusta and its Mayor were about to and would enforce said Ordinance.

9. That the obligation of the contract between The John P. King Manufacturing Company and The City Council of Augusta, claimed to exist, and as hereinbefore described, was impaired by the passage of said Ordinance providing for an increase in the amount to be charged for water power, and said Ordinance should have been set aside so far as plaintiff was concerned, and the defendants restrained and enjoined as prayed for in the bill of complaint from enforcing the same against plaintiff.

10. That the conversations and letters between the promoters, organizers, and officials of The John P. King Manufacturing Company, on the one hand, and The City Council of Augusta, and its officers, on the other hand, in the light of and in connection with the Ordinances and Resolutions of the City, circulars, prospectuses, and building and operating of plaintiff's manufacturing plant, and the being furnished with water power and paying for it in accordance with negotiations theretofore made between the parties, [fol. 120] amounted to a grant by The City Council of Augusta to the plaintiff to obtain and be furnished in perpetuity with the hereinbefore specified amount of water power at the rate of $5.50 per horsepower. That such grant is property.

11. That the passage of the Ordinance set out in the exhibit to the bill of complaint providing for an increase in the amount to be paid for water power, and the enforcement of such Ordinance, was and is a violation of the constitutional provision that no state shall deprive any person of property without due process of law.

12. That because there was a contract in perpetuity as contended for as hereinbefore set out, and because there had been passed and would be enforced the Ordinance hereinbefore referred to, increasing the amount to be paid for water power, the Supreme Court of Georgia erred as set out in plaintiff's specifications of error as follows, to-wit:

"That passage of said Ordinance and the enforcing of the same against the plaintiff's right to use a specified amount of water, say an amount sufficient to supply 1,244.3 horsepower, perpetually, from the Augusta Canal, at the rate of $5.50 per horsepower per annum, amounts to a violation of Article One, Section Ten of the Constitution of the United States, which provides that 'No State shall * * * pass * * * any law impairing the obligation of contracts.'

"That the judgment of the Supreme Court of Georgia is in violation of Article One, Section Ten of the Constitution of the United States which provides 'No State shall * * * pass any * * * law impairing the obligation of contracts' in that it in effect holds valid the aforesaid Ordinance, the enforcement of which Ordinance impairs the obligation of the contract express or implied theretofore arising and existing between the plaintiff and The City Council of Augusta in respect to the right of The John P. King Manufacturing Company to be furnished a specified amount of water power at $5.50 per horsepower per annum.

"That the Supreme Court of Georgia erred in affirming the judgment of the lower court and in holding that The John P. King Manufacturing Company did not have the right to use water power at the rate of $5.50 per horsepower per annum as originally agreed upon with The City Council of Augusta, perpetually, such finding of fact being without evidence to support it and contrary to the undisputed [fol. 121] evidence showing that there was a grant by The City Council of Augusta to The John P. King Manufacturing Company, which amounted to a contract for right to use water perpetually at the rate of $5.50 per horsepower per annum; such finding of fact results in subjecting The John P. King Manufacturing Company to the terms of said Ordinance, and by reason thereof the passage and enforcement of said Ordinance results in a violation of Article One, Section Ten of the Constitution of the United States,

which provides that 'No State shall * * * pass any * * * law impairing the obligation of contracts."

13. That because there was a grant in perpetuity as contended for as hereinbefore set out, and because there had been passed and would be enforced the Ordinance hereinbefore referred to, increasing the amount to be paid for water power, the Supreme Court of Georgia erred as set out in plaintiff's specifications of error as follows, to-wit:

"That the enforcement of said Ordinance thereby depriving The John P. King Manufacturing Company of the right to be furnished the specified amount of water at $5.50 per horsepower per annum, with all the rights and priorities as heretofore enjoyed by it, would deprive The John P. King Manufacturing Company of 'property without due process of law' contrary to the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States.

"That the judgment of the Supreme Court of Georgia is in violation of Section One of the Fourteenth Amendment of the Constitution of the United States, which provides that no person shall be deprived of 'property without due process of law', in that said judgment leaves the City of Augusta free and permits it to enforce said Ordinance, by the terms of which users of water power of the Augusta Canal are required to pay $11.00 per horsepower per annum for water so furnished, and thereby deprives The John P. King Manufacturing Company of its property right to have the specified amount of water at the rate of $5.50 per horsepower per annum with all the rights and priorities as heretofore enjoyed by it.

"That the Supreme Court of Georgia erred in affirming the judgment of the lower court thereby leaving the defendants free to deprive The John P. King Manufacturing Company of the specified amount of water at $5.50 per horsepower; the effect of which is to permit the defendants by virtue of said Ordinance to deprive The John P. King Manufacturing Company of its property without due process of law contrary to the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States which provides that no State 'Shall deprive any person of * * * property without due process of law.'"

[fol. 122] 14. Plaintiff specifies as the parts of the record

which it thinks necessary for the consideration of the points hereinbefore set out the following:

Plaintiff's petition and all of the exhibits thereto.

Defendants' demurrer.

Defendants' answer.

Judgment and opinion of the Superior Court of Richmond County refusing the injunction prayed for.

Judgment of Superior Court of Richmond County sustaining demurrer and dismissing case.

Bill of exceptions from Superior Court of Richmond County to Supreme Court of Georgia, together with the Judge's certificate to the same, and the brief of the evidence attached as an exhibit to said bill of exceptions, excepting therefrom however the following evidence as it appears therein, to wit:

The interview of Mr. Estes appearing after and following the words "Canal Contracts."

Evidence of W. S. Brown, who testified by affidavit for plaintiff.

Evidence of Elroy G. Smith, who testified by affidavit for plaintiff.

Evidence of Nisbet Wingfield, who testified by affidavit for defendants.

Evidence of W. H. Wise, and W. W. Hunter, who testified by affidavit for defendants.

Evidence of Malcolm H. Hendee, who testified by affidavit for plaintiff.

Evidence of E. G. Smith, who testified by a second affidavit for plaintiff.

Judgment of the Supreme Court of Georgia substituting Raleigh H. Daniel, Mayor, as party defendant in place of William P. White, Mayor.

Judgment of the Supreme Court of Georgia of May 13, 1927.

Opinion of the Supreme Court of Georgia.

The petition for writ of error and the specifications of error included therein, with the allowance by the Chief Justice.

[fol. 123] Writ of error.

Citation with the acknowledgment of service.

Bryan Cumming, Cumming & Harper, Attorneys for the John P. King Manufacturing Company.

Due and legal service of a copy of the foregoing statement of points acknowledged, and all further service waived. This 18th day of July, 1927.

Archibald Blackburn, E. H. Callaway & Callaway & Howard, Attorneys for Defendants, The City Council of Augusta and Raleigh H. Daniel, Mayor.

[fol. 124] [Endorsed:] Supreme Court of the United States. The John P. King Manufacturing Company, Plaintiff in Error, vs. The City Council of Augusta, and Raleigh H. Daniel, Mayor of the City of Augusta, Defendants in Error. Statement of points upon which plaintiff in error expects to rely. Cumming & Harper, Attorneys at Law, Augusta, Georgia.

[fol. 125] [File endorsement omitted.]

Endorsed on cover: File No. 32,844. Georgia Supreme Court. Term No. 392. The John P. King Manufacturing Company, plaintiff in error, vs. The City Council of Augusta and Raleigh H. Daniel, Mayor, etc. Filed July 20th, 1927. File No. 32,844.

DEC 3 1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927

No. 392

THE JOHN P. KING MANUFACTURING COMPANY,
PLAINTIFF IN ERROR.

vs.

THE CITY COUNCIL OF AUGUSTA AND RALEIGH H. DANIEL,
MAYOR, ETC., DEFENDANTS IN ERROR.

Brief for Plaintiff in Error

BRYAN CUMMING,
Attorney for Plaintiff in Error,
AUGUSTA, GA.

SUBJECT INDEX

PART 1.

Page

Grounds on which the jurisdiction of the Supreme Court is invoked 1-6
Judgment to be reviewed 1-2
Grounds for relief prayed for 1
Relief prayed for 1
Specific claims advanced and rulings made in lower court 2-4
Claims advanced 2-3
Rulings made 3-4
Statutory provisions under which jurisdiction is invoked 4-5
Jurisdiction, statute under which invoked 4-5
Cases sustaining the jurisdiction 5-6

PART 2.

A Concise Statement of the Case 6-12
Contentions of Plaintiff in Error as to conclusions to be drawn from undisputed facts 9
Contentions of Defendants in Error as to conclusions to be drawn from undisputed facts 10-12
Contract or grant, existence of, shown by
Conversations 7
Correspondence 7-8
Ordinances and resolutions 7
Admissions of Defendants 12
Contract or grant denied by Defendants because,
Matters relied on by Plaintiff properly construed do not amount to a contract or grant 11-12
Ultra vires 11
Void because of hardship 11
Void because of mutuality 11
Void because discriminatory 11

Page

Contract or grant, right to change, Defendants' contend because
Discriminatory 11
Hardship of 11
Public utility 11

Facts, undisputed, established by averments of bill, admissions of answer, and undisputed evidence 6-10

Grounds of relief prayed for 9

Law, validity of which is attached 9

Ordinance, complained of, will be enforced by Defendants 12

Relief prayed for, and grounds of 9

Vested right to water power in Plaintiff, admitted by Defendants 12

Water power, right to have in perpetuity, recognized by Defendants 12

Water power, at claimed rate in perpetuity, denied by Defendants 11

PART 3.

Specification of Assigned Errors Intended to Be Urged 13-15

PART 4.

Argument 15-47

Act of 1845, not authority to avoid contract or grant 35-36

Attitude of Defendants to establishment of new enterprises 27

Claims advanced in lower court 15-16

Page

Conduct of Plaintiff as result of transactions with City 20

Consideration, contract not lacking in 39-41

Contract or grant,
Conversations sustaining 18
Correspondence sustaining 18, 19
Ordinances and resolutions sustaining 18
Circumstances surrounding the making 24-26
The consideration for 20, 39-41

Contract or grant, in construing should consider surrounding circumstances 17, 22, 23

Contract or grant, court will examine evidence to determine existence of 16

Contracts or grants, duration of when silent as to time limit 28-30
Citations 31-33

Contracts or grants, hardship of no defense,
Citations 42-43

Contract, voidable, Defendants' claim, because of Act of 1845 34

Discrimination, Defendants not prevented from, because operating a public utility 42

Duration of Contracts, silent as to time, ... 28-30
Citations 31-33

Evidence, Court will examine for itself to determine existence of contract 16

Grants, duration of when silent as to time,
Citations 33

Hardship of contract no ground for avoidance, and citations 42-43

Incorporation of Plaintiff 20

Marshall case, discussion of 43-44

Millers vs. Augusta, discussion of 44

Page

Public utility, as, not prevented from discriminating 42

Specification of errors, insistence on 45-47

Texas & Pacific Ry. vs. Marshall, discussion of 43-44

Ultra vires, the contract or grant not, and citations 36-38

Vested right to water power in perpetuity, and citations 44-45

Vested right to water power in Plaintiff admitted by Defendants 17, 21-22

Voidable, Defendants' claim contract is because of Act of 1845 34

Water power, right to have in perpetuity recognized by Defendants 17, 21, 22, 27

Water power, at claimed rate in perpetuity denied by Defendants 17, 22, 27

TABLE OF CASES CITED

Page

Adepe vs. City of Thomasville, 9 Ga. App. 880.....37, 38
Aetna Life Ins. Co. vs. Dunkan, 266 U. S. 389, 394.. 6, 17
Austell, Adm'r vs. Rice, 5 Ga. 472..... 41
Cherokee Mills vs. Standard Cotton Mills, 138 Ga. 856 34
Chesapeake & Ohio Canal Co. vs. Hill, 82 U. S. (12 Wall) 94 23
City of Dublin vs. Ogburn, 142 Ga. 840.....37, 38
Columbia Railway Gas & E. Co., vs. South Carolina, 261 U. S. 236, 245..... 5, 16
Corpus Juris, Vol. 13, page 604, par. 629, 630..... 28
Cyc. Vol. 28, page 636..... 37
Dahnke-Walker Milling Co. vs. Bondurant, 257 U. S. 282, 288 6
Dillon on Municipal Corporations, Fifth Edition, par. 1647, 1670 37
Fiske vs. State of Kansas, Supreme Court U. S., No. 48, decided May 16, 1927 (Not yet reported) 6, 17
Franklin Telegraph Co. vs. Harrison, 145 U. S. 459, 472 31
Franklin Telegraph Co. vs. Harrison, 145 U. S. 459, 471, 473..... 31
Franklin Telegraph Co. vs. Harrison, 145 U. S. 459, 471-473 43
Georgia Code 1910, Section 4242..... 40
Georgia Code 1910, Section 4243..... 40
Georgia Code 1910, Section 4246..... 40
Georgia Code 1910, Section 4249..... 41
Georgia Laws, 1845, page 138..... 35
Georgia Railway & Power Co. vs. Decatur, 262 U. S. 432 (4)..... 5, 16
Hamilton Gas Light & Coke Co. vs. Hamilton City, 146 U. S. 258 5

Page

Houston & T. C. R. Co. vs. Texas, 177 U. S. 66 ..... 5, 16
Huey vs. Atlanta, 8 Ga. App. 597, 599 37
Jernigan, Lawrence & Co. vs. Wimberly, 1 Ga. 220 41
Lord vs. Atlanta, 17 Ga. App. 113 37
Mayor and Council Macon vs. Franklin, 12 Ga. 239, 243 34
McKell vs. Chesapeake & Ohio Ry. Co., Circuit Court of Appeals, 6th Circuit, January 4, 1910, 175 Fed. 321 ..... 28, 29
McKell vs. Chesapeake & Ohio Ry. Co., Circuit Court of Appeals, 6th Circuit, January 9, 1911, 186 Fed. 39, 45 30
Millers vs. The City Council of Augusta, 63 Ga. 772 44
New Orleans Water Works vs. Louisiana Sugar Refining Co. 125 U. S. 18, 31 5
Northern Ohio Traction & Light Co. vs. State of Ohio, etc., 245 U. S. 574, 585 32
Northern Pacific Railway vs. North Dakota, 236 U. S. 585, 593 ..... 6, 17
Omaha Water Co. vs. City of Omaha, Circuit Court of Appeals, 8th Circuit Nov. 8, 1907, 156 Fed. 922 39
Rerick vs. Karn, 14 Sergeant & Rawls, 267 ..... 33, 34
Rosmassler vs. Speilberger, 270 Pa. Rep. 30 33
Rutland Marble Co. vs. Ripley, 77 U. S. (10 Wall) 339, 356 43
St. Paul Gas Light Co. vs. City of St. Paul, 181 U. S. 142, 147 ..... 5, 16
Sheffield vs. Collier, 3 Ga. 82 34
Texas & Pacific Ry. Co. vs. City of Marshall, 136 U. S. 393 43
Tuttle Brothers & Bruce vs. City of Cedar Rapids, Circuit Court of Appeals, 8th Circuit, Feb. 21, 1910, 176 Fed. 86 39
United States Code, Title 28, Section 344 5

Page

Village of Oshkosh vs. Fairbanks, Moss & Co., Circuit Court of Appeals, 8th Circuit, September 14, 1925, 8 Fed. (2nd Series), 329 38

Walla Walla vs. Walla Walla Water Co., 172 U. S. 1 5

Western Union Telegraph Co. vs. Pennsylvania Company, Circuit Court of Appeals, Third Circuit, May 2, 1904. 129 Fed. 849 ..... 29, 32

Wykes vs. City Water Co. of Santa Cruz, Circuit Court Nor. Dist. California, Jan. 31, 1911, No. 12697, 184 Fed. 752 38

In The

Supreme Court of the United States

October Term, 1927

No. 392

The John P. King Manufacturing Company,
Plaintiff in Error.

vs.

The City Council of Augusta and Raleigh H. Daniel,
Mayor, Etc., Defendants in Error.

Brief for Plaintiff in Error

PART 1.

Statement of Grounds on Which the Jurisdiction of the Supreme Court Is Invoked.

Judgment to Be Reviewed.

Plaintiff in Error filed its complaint in the Superior Court of Richmond County, Georgia, seeking to enjoin The City Council of Augusta (hereinafter referred to as the City) and its Mayor, from enforcing a certain Ordinance increasing charges for water power furnished by the City from its canal, on the ground that the passage and enforcement of this Ordinance violated the Constitutional provision that "No State shall . . . pass . . . any law impairing the obligation of contracts," and likewise deprived the plaintiff of its property "without due process of law."

The Superior Court of Richmond County denied the relief prayed and dismissed the complaint (R. 71). Upon writ of error to the Supreme Court of Georgia, that Court affirmed the judgment of the Court below in a judgment rendered on May 13, 1927 (R. 7), and it is this judgment which it is sought to have reviewed.

The case has not yet been reported.

The Specific Claims Advanced and Rulings Made in the Lower Court.

In the State Court the plaintiff claimed that certain conversations, correspondence and resolutions and the action and investments of plaintiff based thereon, construed in the light of antecedent and attendant circumstances, constituted a contract between plaintiff and the City, for the plaintiff to be furnished by the City with a definite amount of water power in perpetuity at the rate of $5.50 per horsepower per annum; that the said transactions between the parties, construed in the light of preceding and attendant circumstances, constituted a grant by the defendant to the plaintiff of a right to have and be furnished with water power in perpetuity at the rate of $5.50 per horsepower per annum (R. 29, 30).

The plaintiff further claimed that the passage of the ordinance complained of violated that portion of the Constitution of the United States which provides that "No State shall..... pass..... any law impairing the obligation of contracts;" (R. 33), also that the passage and enforcement of said ordinance deprived the plaintiff of its property "without due process of law" contrary to the provisions of the Constitution of the United States. (R. 33.)

That for the foregoing reasons the defendant and its Mayor should be enjoined from enforcing the ordinance complained of (R. 34), and an injunction was prayed for (R. 34).

The Superior Court of Richmond County, the Court of first instance, ruled that the plaintiff had no contract or grant as claimed (R. 66-71), and refused to grant an injunction (R. 71), sustained the defendant's demurrer and dismissed the bill (R. 71). This judgment of the Superior Court was taken by Writ of Error to the Supreme Court of Georgia (R. 11-23), and the Supreme Court of Georgia sustained the judgment of the lower Court (R. 7), which is the judgment here excepted to.

The rulings relied upon as the basis of this Court's jurisdiction are the findings and rulings of the lower Court that

> "Construing the conversations and correspondence between The City Council of Augusta and the plaintiff, respecting the alleged contract in the light of the charter powers of the City in acquiring the Augusta Canal, and the acts of the parties with reference thereto, a contract to furnish water power by the former to the latter, at a specified rate perpetually, is not made out" (R. 10).

and the Court having stated that

> "The controlling question in the case was whether the City of Augusta had theretofore entered into a contract with John P. King Manufacturing Company to supply it with water power at the specified rate of $5.50 per horsepower per annum, or had made a grant to the plaintiff of the right to have a

certain water power for a specified rate, which right under all the surrounding facts the City was estopped from withdrawing" (R. 8),

ruled that

> "After carefully considering the whole case we are of the opinion that the Court did not err in refusing an injunction, or in sustaining the demurrer and dismissing the case." (R. 11.)

And the resultant judgment affirming the judgment of the Superior Court of Richmond County, Georgia, which after stating case was as follows:

> "This case came before this Court upon Writ of Error from the Superior Court of Richmond County; and after argument had it is considered and adjudged that the judgment of the Court below be affirmed, all the justices concur" (R. 7).

Statutory Provisions Under Which Jurisdiction of the Supreme Court of the United States Is Invoked.

The judgment of this Court is invoked under the provision of the Judicial Code reading as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had . . . where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. . . The Supreme Court may

reverse, modify or affirm the judgment or decree of such State Court, and may in its discretion award execution or remand the cause to the Court from which it was removed by the writ."

U. S. C. Title 28, Sec. 344.

Cases Sustaining the Jurisdiction.

An ordinance of a municipal corporation is a law of a State within the meaning of the Constitution.

St. Paul Gas Light Company vs. City of St. Paul. 181 U. S. 142, 148.

New Orleans Waterworks vs. Louisiana Sugar Refining Company. 125 U. S. 18, 31.

Hamilton Gas Light & Coke Company vs. Hamilton City. 146 U. S. 258.

Walla Walla vs. Walla Walla Water Company. 172 U. S. 1.

Though the State Court may have found that there was no contract or grant, and hence no obligation to be impaired or property of which to be deprived, the Supreme Court will examine the facts to ascertain whether there was a contract or grant.

St. Paul Gas & Light Company vs. City of St. Paul. 181 U. S. 142, 147.

Houston & T. C. R. Company vs. Texas. 177 U. S. 66.

Columbia Ry. Gas & E. Co. vs. South Carolina. 261 U. S. 236, 245.

Ga. Ry. & R. Co. vs. Decatur. 262 U. S. 432 (4).

The Supreme Court

"will review the finding of facts by a State Court where a Federal right has been denied as the result

of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to Federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the Federal question, to analyze the facts."

Fiske vs. State of Kansas. Supreme Court of the United States. No. 48. Decided May 16, 1927.

Northern Pacific Railway vs. North Dakota. 236 U. S. 585, 593.

Aetna Life Insurance Company vs. Dunkan. 266 U. S. 389, 394.

"A decision of a State Court applying and enforcing a State statute of general scope against a particular transaction, as to which there was a distinct and timely insistence that if so applied the statute was void under the Federal Constitution, necessarily affirms the validity of the statute, as so applied, and the judgment is therefore reviewable under Section 237 of the Judicial Code."

Fiske vs. State of Kansas. Supreme Court of the United States. No. 8. Decided May 16, 1927.

Dahnke-Walker Milling Co. vs. Bondurant. 257 U. S. 282, 288.

PART 2.

A Concise Statement of the Case.

The facts established by the allegations of the petition, admitted by the answer and supplemented by undisputed evidence, show that the Augusta Canal Company was organized as a private corporation, to con-

struct a Canal and operate the same by furnishing water power to manufacturing establishments (R. 24), and that the City, under proper legislative authority became the successor in title to all the property and franchises of this private corporation. (R. 24, 25, 58.) After the City had thus acquired the Augusta Canal properties, the promoters of The John P. King Manufacturing Company made a verbal application to the Mayor of the City for information as to the terms upon which water could be obtained from the Augusta Canal (R. 26, 27, 59). To this application, on July 17, 1877, the then Mayor of Augusta replied as follows:

> "The City Council of Augusta will furnish water power from the Augusta Canal under the usual restrictions to the extent of say 2500 horsepower at $5.50 per horsepower per annum, payable quarterly." (R. 27, 59.)

At a meeting of City Council held June 6, 1881, a resolution was passed authorizing the Canal Committee to grant the application of The John P. King Manufacturing Company to have put under offer to it for a reasonable time 1500 horsepower of water from the Augusta Canal, under the usual regulations for its use, and at the price now charged other mills, to-wit: $5.50 per horsepower per annum, a copy of this resolution being transmitted to the Temporary Vice-President of The John P. King Manufacturing Company, under date of June 14, 1881. (R. 27, 44, 45, 60.)

On March 18, 1882, the then President of The John P. King Manufacturing Company addressed a letter to the Mayor and City Council, reading as follows:

By their answer they admitted (R. 59, 61) plaintiff's averment (R. 26, 28), that the obtaining horsepower at $5.50 per horsepower was one of the considerations which induced petitioner to organize a manufacturing corporation and construct its plant in Augusta.

They denied that the City's depriving complainant of water at $5.50 per horsepower would be a violation of the constitutional provision that "no state shall . . . pass any . . . law impairing the obligation of contracts" (R. 64), or that it would be depriving petitioner of property without "due process of law" contrary to the constitution of the United States (R. 64).

Defendants admitted all the other facts alleged by plaintiff as hereinabove set out as will be seen by reference to the different paragraphs of defendants' answer (R. 57-66). They merely denied the conclusions of the complainant drawn from said facts.

Defendants further contended that the defendant, The City Council of Augusta, was the successor to all the powers and privileges conferred upon the Augusta Canal Company (R. 58), and among these powers and privileges was the right to make and enforce rules and regulations in relation to the use of canal and its water for navigation and other purposes, and impose and collect such tolls, rents, or other charges as it might deem equitable or expedient and which do not interfere with any of the existing contracts or obligations of originally the Canal Company, now the City. (R. 58), and that these provisions of the Act authorized the City of Augusta at any time to change the amounts charged. (R. 58, 59, 60, 62, 63.)

That the language used in the ordinance of February 5, 1872 (R. 25), imputed a meaning and intent to reserve the right to change the tolls and rents charged for the use of water power from time to time in accordance with the provisions of the Acts of 1845. (R. 58, 62, 63.)

That none of the Acts, Resolutions or Ordinances of the City of Augusta could be construed as fixing in perpetuity the rate of $5.50 per horsepower, nor could the conversations and letters passing between offices of the plaintiff and of the City of Augusta and the resolutions passed in connection therewith be construed as a contract for water power at $5.50 per horsepower in perpetuity (R. 59, 60, 61, 62, 63).

That an attempt to contract to fix such a rate in perpetuity would be inconsistent with the powers conferred by the Act incorporating the Augusta Canal Company, to which the City was the successor, and for that reason such a contract could be avoided. (R. 59.)

That a contract in perpetuity, even if one existed as contended for by plaintiff, would be void because it was wanting in mutuality, and was unilateral because plaintiff did not directly or indirectly make any promise or enter into any contract or agreement, nor bind itself to take and pay for water power at such rate in perpetuity. (R. 60, 63.)

That a contract as contended for by plaintiff was void because it would result in discrimination in its favor as against other water power customers. (R. 64, 65.)

That it was void because of the hardship upon the City resulting from the increased cost of maintenance (R. 65); that the new rate of $11.00 was a reasonable

one and that the City could modify the existing contract to a reasonable rate (R. 65.)

The issuing of the circulars of July 2, 1881, and November 1, 1881 (R. 28), is neither admitted or denied (R. 60), but it is claimed that they would have no binding effect upon the City of Augusta (R. 61).

That the plaintiff never entered into any contract other than by the actual use of the water, and the payment of charges according to current rates prevailing at the time. (R. 61, 62.)

That The City Council of Augusta operating the Canal as a public utility had the right to fix and change the rates at any time. (R. 65.)

That the plaintiff had a vested right to the water in perpetuity, but only so long as it paid whatever rates the City charged (R. 61, par. 15); admits that the conduct and acts of the plaintiff and City Council of Augusta constituted a contract, but only by implication of law as no express contract was ever entered into (R. 62, par. 19); at no place do defendants deny that there was an implied contract.

That the City of Augusta had the legal right to adopt the Ordinance complained of and enforce the same, and that if plaintiff does not enter into a contract at the increased water rent that it will be deprived of its water power. (R. 63, 64.)

PART 3.

Specification of Such of the Assigned Errors as Are Intended to Be Urged

Plaintiff in Error specifies as the assignments of errors which this Court is asked to consider and pass upon the following:

1. "That passage of said Ordinance (that is the Ordinance attacked as invalid and appearing R. 50) and the enforcing of the same against the plaintiff's right to use a specified amount of water, say an amount sufficient to supply 1244.3 horsepower, perpetually, from the Augusta Canal, at the rate of $5.50 per horsepower per annum, amounts to a violation of Article One, Section Ten of the Constitution of the United States, which provides that 'No State shall . . . pass . . . any law impairing the obligation of contracts.'" (R. 3, 4.)

2. That the judgment of the Supreme Court of Georgia is in violation of Article One, Section Ten, of the Constitution of the United States which provides "No State shall . . . pass any . . . law impairing the obligation of contracts" in that it in effect holds valid the aforesaid Ordinance, the enforcement of which Ordinance impairs the obligation of the contract express or implied theretofore arising and existing between the plaintiff and The City Council of Augusta in respect to the right of The John P. King Manufacturing Company to be furnished a specified amount of water power at $5.50 per horsepower per annum. (R.4.)

3. That the Supreme Court of Georgia erred in affirming the judgment of the lower Court and in hold-

ing that The John P. King Manufacturing Company did not have the right to use water power at the rate of $5.50 per horsepower per annum as originally agreed upon with The City Council of Augusta, perpetually, such finding of fact being without evidence to support it and contrary to the undisputed evidence showing that there was a grant by The City Council of Augusta to The John P. King Manufacturing Company, which amounted to a contract for right to use water perpetually at the rate of $5.50 per horsepower per annum; such finding of fact results in subjecting The John P. King Manufacturing Company to the terms of said Ordinance, and by reason thereof the passage and enforcement of said Ordinance results in a violation of Article One, Section Ten of the Constitution of the United States,, which provides that "No State shall . . . pass any . . . law impairing the obligation of contracts." (R. 4.)

4. That the enforcement of said Ordinance thereby depriving The John P. King Manufacturing Company of the right to be furnished the specified amount of water at $5.50 per horsepower per annum, with all the rights and priorities as heretofore enjoyed by it, would deprive The John P. King Manufacturing Company of "property without due process of law" contrary to the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States. (R. 4.)

5. That the judgment of the Supreme Court of Georgia is in violation of Section One of the Fourteenth Amendment of the Constitution of the United States, which provides that no person shall be deprived of "property without due process of law," in that said judgment leaves the City of Augusta free and permits it to enforce said Ordinance, by the terms of which

users of water power of the Augusta Canal are required to pay $11.00 per horsepower per annum for water so furnished, and thereby deprives The John P. King Manufacturing Company of its property right to have the specified amount of water at the rate of $5.50 per horsepower per annum with all the rights and priorities as heretofore enjoyed by it. (R. 5.)

6. That the Supreme Court of Georgia erred in affirming the judgment of the lower court thereby leaving the defendants free to deprive The John P. King Manufacturing Company of the specified amount of water at $5.50 per horsepower; the effect of which is to permit the defendants by virtue of said Ordinance to deprive The John P. King Manufacturing Company of its property without due process of law contrary to the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States which provides that no State "shall deprive any person of . . . property without due process of law." (R. 6.)

PART 4.

Argument.

At the risk of perhaps unnecessary repetition, the plaintiff gives as a summary of the points of law and fact to be considered.

First, whether or not a Federal question is involved. The plaintiff contends that under the undisputed facts it appears that the constitutional provisions prohibiting a State from passing any law impairing the obligation of contracts or depriving any person of property without due process of law has been violated; that when

the question has been raised in the lower Court and by proper exception here, that there has been a violation of constitutional provisions, this Court will examine the facts and determine for itself whether or not a contract existed, the obligation of which is impaired by statute or whether or not under the facts the person is deprived of property without due process of law.

Second. This will then lead to a consideration of the facts of this case which the plaintiff claims are undisputed and clearly show the existence of a contract in perpetuity or in any event an irrevocable grant. Apparently the existence of the right to have water power perpetuity or in any event an irrevocable grant.

Third. If a perpetual contract or irrevocable grant is established by the facts and the law applicable thereto it follows that the action of the City in passing the Ordinance complained of impaired the obligation of this contract and deprived the plaintiff of its property without due process of law.

As to the first proposition above the Court in a case of this kind will examine the evidence to determine for itself what facts the evidence establishes, the true purport and meaning of the facts so established by the evidence and decide whether or not those facts establish the existence of a contract or a grant.

St. Paul Gas Light Co. vs. City of St. Paul.
181 U. S. 142, 147.
Houston & T. C. R. Co. vs. Texas. 177 U. S. 66.
Columbia Ry. Gas & E. Co. vs. South Carolina.
261 U. S. 236, 245.
Georgia Ry. & P. Co. vs. Decatur.

262 U. S. 432 (4).
Fiske vs. State of Kansas. Supreme Court of U. S. No. 78. Decided May 16, 1927. Not yet reported.
Northern Pacific Railway vs. North Dakota. 236 U. S. 585, 593.
Aetna Life Insurance Company vs. Dunkan. 266 U. S. 389, 394.

The main question involved in this case is that involved in the second proposition above which we will now discuss to determine whether or not there was a contract or a grant.

Apparently the existence of the right to have water power either by reason of an implied contract or grant is recognized by the defendants. (R. 60, 62.) The point made by the defendants, however, is that the right whatever it may be is not one in perpetuity so far as the rate charged for water power is concerned. The defendant admits the right of plaintiff to obtain water power as long as it may desire to do so (R. 61, 62), but insists that the City had a reserve power at any time to alter contracts made with users of water power (R. 58, 62, 63).

We will first direct attention to what occurred directly between the plaintiff and its promoters on the one hand and the City on the other, and after that consider the proper construction to be placed on these happenings in the light of the surrounding circumstances, which it is contended should be taken into consideration in construing and determining the rights of the parties.

It appears in a letter of the then Mayor of the City dated July 17, 1877, that one Charles Estes who was apparently the Chairman of the promoters of The John P. King Manufacturing Company and afterwards its President, had inquired verbally of the Mayor of the City as to the terms under which water power could be obtained. (R. 26, 27, 42.) The Mayor in his letter which is addressed to Estes makes reference to such conversation and goes on to say:

> "The City Council will furnish water from the Augusta Canal under the usual restrictions to the extent of say (2500) twenty-five hundred horsepower at ($5.50) five dollars and fifty cents per horespower per annum payable quarterly." (R.42.)

On June 6, 1881, at a regular meeting of The City Council of Augusta a resolution was adopted as follows:

> "The Canal Committee and the Committee of the Whole recommend that the petition of W. E. McCoy and The John P. King Manufacturing Company for water power be granted at the established rate and under the proper regulations." (R. 44, 45.)

This report of the Canal Committee was based upon a petition of The John P. King Manufacturing Company asking to have put under offer to it for a reasonable time a site for a contemplated factory, and also to have put under offer to said Company 1500 horsepower of water from the Augusta Canal under the usual regulations for its use and at the price now charged other mills, to-wit: $5.50 per horsepower per annum (R. 27, 45), a certified copy of this action of The City Council was on June 14, 1881, sent by the Clerk of

Council to Charles Estes, temporary Vice-President of The John P. King Manufacturing Company (R. 28, 45).

On March 18, 1882, Charles Estes, President of John P. King Manufacturing Company, wrote a letter to Honorable R. H. May, then Mayor of The City Council of Augusta, reading as follows:

> "Referring to the application of The John P. King Manufacturing Company of June 1st last year for water power which you so kindly and promptly granted, desire to say that said Company is now ready and wishes to enter into formal contract for the same at your earliest convenience." (R. 29, 49.)

On May 24, 1882, the Engineer of the City of Augusta wrote to the President of the plaintiff as follows:

> "I am requested by the Mayor and Canal Committee to ask you to inform them what amount of water you desire to contract for and that you will notify them immediately of the same. I also call your attention to Section 6, last four lines of Section 9 and Section 14 in proposals enclosed. In stating the requisite number of horsepower be specific as to whether you mean gross or net horsepower." (R. 29, 49.)

On May 27, 1882, plaintiff's President wrote to the City Engineer as follows:

> "In reply to yours of 24th inst. would say. That in confirmation of ours of June 1st, 1881, and March 18, 1882, That 'The John P. King Manfg. & Co.' wish to contract for so much water per second

as will produce on (33) thirty-three feet head and fall (1500) fifteen hundred horsepower gross or in other words to make it more clear we wish to contract for (400) four hundred cubic feet of water per second on that fall to be so used when the established canal level is raised to that point and to be used on the level as now established say thirty and a half feet fall producing on the last named fall (1386 36-100) thirteen hundred and eighty-six 36-100 horsepower gross and to commence paying for the same with ordinary diligence in constructing our mill." (R. 29, 50.)

Apparently nothing further either orally or written was done to evidence the relations of the parties in reference to the water power (R. 29), but those who were promoting The John P. King Manufacturing Company procured its incorporation on the 31st day of May, 1881, for a period of twenty years (R. 28), with the right of renewal (R. 28), and the promoters and corporators undertook to procure and did procure subscriptions to the corporate stock based upon, among other considerations, obtaining water power at the rate of $5.50 per horsepower in perpetuity (R. 17, 28 47, 48), and further upon the faith of the grant of the water power, proceeded to erect its cotton goods manufacturing plant at a cost of more than a million dollars (R. 28, 29), all in consequence of the negotiations, conferences and exchange of letters and resolutions, and on December 1, 1883, put in operation its manufacturing plant adjoining the Augusta Canal and from that time continuously down to the present time carried on its business of the manufacture of cotton goods and from the very outset after having obtained the grant of 1500 horsepower actually took up the use

of 1244.3 horsepower paying therefor the sum of $5.50 per horsepower per annum, which it has continued to pay down to the present time. (R. 29.)

We think we can safely say without any further argument that the above recited facts show that an obligation arose upon the part of the City to supply water to the plaintiff at the rate of $5.50 per horsepower. That seems to be conceded by the defendants for in their answer to Paragraph 15 of plaintiff's petition (R. 29), after admitting the facts set out in said Paragraph 15, they use the following language:

> "And for further answer thereto said defendants deny that said conduct and acts on the part of the plaintiff as in said paragraph set forth conferred upon plaintiff **anything more than a vested right to obtain water power from said Canal as long as it might carry on and continue the operation of its plant** as a manufacturing plant and as long as it continued as a customer of the City of Augusta for the use of said water power." (R. 61.)

Likewise in answer to paragraph 16 of the petition, defendants in paragraph 16 of their answer say that the facts set out and admitted "only entitled plaintiff, as long as it continued its manufacturing plant and the operation thereof to obtain water power from said canal at the current rate which might be in existence." (R. 62.) Here is a clear and unequivocal admission of a vested right. It is true that there is coupled with the admission the contention that the plaintiff must pay whatever rate might be charged by the City (R. 61, 62). It is true that the defendants do not classify this vested right as one arising out of a contract. It did arise,

however, out of the facts hereinbefore referred to and the plaintiff contends that that vested right both as to power and rate charged for same cannot be taken away from it by the ordinance because the vested right falls under the classification either of a contract or of a grant.

It seems that there is really no dispute between the parties as to the right of the City to make a contract to supply the agreed **amount** of water power in perpetuity (R. 61, 62). The difference between the parties narrows down as to whether or not the arrangements which were made bound the City to furnish not only the water power perpetually, but at the named rate perpetually; and this final point of difference resolves itself first into whether or not a proper construction of the negotiations, letters, resolutions and resulting conduct of the plaintiff carries with it the idea of perpetuity; and, secondly, if it establishes such a construction whether it was within the power of the City to so bind itself in view of its reserve powers in the act creating the Augusta Canal or because of the general principle that municipal corporations cannot enter into a perpetual contract of this kind or that the contract was void because of lack of consideration and want of mutuality.

In determining the true purport and intent of the above recited transactions between the parties it is right and proper to consider the conditions existing at the time of entering into the arrangement between the parties.

> "The large investment of capital made by the appellee in sole reliance on the water power . . .

with the full knowledge which the appellants had of this reliance and intended investment, renders it necessary that we should **look carefully to the substance of this agreement . . . as contra-distinguished from its mere form,** in order that we may give it a fair and just construction and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements."

Chesapeake & Ohio Canal Co. vs. Hill,
82 U. S. (12 Wall) 94.

In this case the Court said in reference to ascertaining the terms and meaning of the contract that

"In making this inquiry we, the Court, have a right to examine into the **state of things existing at the time and the circumstances in which the lease was made.** This kind of evidence is especially pertinent when the inquiry is to the subject matter of the agreement."

Ibid, page 97.

In view of the foregoing announced principle, it is proper to examine into the state of things existing at the time and the circumstances under which the manufacturing plant of The John P. King Manufacturing Company was built, and the arrangements made to obtain a power supply for it when completed.

The pertinent, undisputed facts and circumstances that preceded, led up to and surrounded the making of the contract between the City and plaintiff are as follows:

The Augusta Canal Company was a private corporation incorporated by an Act of the Legislature of December 27, 1845, empowered to construct a Canal conveying water from the Savannah River through the City of Augusta for the purpose of supplying water to the City of Augusta for municipal and manufacturing purposes, and said Company organized and constructed a Canal in accordance with the terms of the charter and put the same in operation. (R. 24.) Thereafter, by Acts of the Legislature passed in 1849 and in 1854, the City was empowered to purchase all the estate, franchises and privileges theretofore granted to the Augusta Canal Company, and in 1866 the Board of Managers of the Augusta Canal Company passed a resolution that the Canal property be transferred to The City Council of Augusta, and in 1868 another resolution was passed by the Augusta Canal Company directing the preparation of the necessary papers to accomplish such purpose, and the City passed a resolution directing the Managers of the Canal Company to transfer the Canal to the City. Thereafter on July 6, 1876, a deed was executed by the Augusta Canal Company, transferring all its property, real and personal and its franchises, to the City. (R. 24, 25.) In 1872 the City was desirous of encouraging the locating and building of manufacturing plants in the City of Augusta, as exemplified by an Ordinance of February 5, 1872, which undertook to exempt from taxation for a period of ten years capital invested in the manufacture of cotton yarns or cotton fabrics, provided they were established in the City and derived their power from the Augusta Canal (R. 25); and again in 1873 by an Ordinance passed, it undertook to pay a bonus to persons who should by negotiation or otherwise bring outside capital to the City, *to be* invested in the manufac-

ture of cotton goods on or near the Augusta Canal, using the water power of the Canal to drive the machinery (R. 25, 26); and again in 1875 there was published, under the direction of the Board of Managers of the Augusta Canal, a pamphlet by Byron Holley, a Civil Engineer, setting forth in glowing terms the advantages of the Augusta Canal, which was at that time owned by the City of Augusta. (R. 26.) Copy of the pamphlet referred to is attached to the petition, and states that it was issued by the Board of Managers of the Canal

> "for the purpose of giving information concerning the water power and the facilities for using it, and to make known the specifications and regulations under which they proposed to sell or lease the water." (R. 37.)

There had also been passed on April 5, 1880, an Ordinance by the City, entitled "An Ordinance to fix the price of water power on the Augusta Canal," which provided

> "That from and after the passage of this Ordinance, the rates for horsepower for water on the Augusta Canal shall be $5.50 for mills of any and all kinds to be contracted for as at present." (R. 26, 42.)

It should also be noted that at that time there was in existence a contract with The Augusta Factory, under which water was furnished to it in perpetuity (R. 20); that on March 10, 1877, the City, on passing upon certain applications for water power, resolved that water power be furnished at the same rate per

horsepower as now (then) paid by The Augusta Factory (R. 28, 46); and again on December 7, 1877, upon other applications for water power, it was resolved that all mills be placed upon the same footing as to the rate of horsepower. (R. 28, 46.) The rate charged the Augusta Factory was $5.50 per horsepower as shown by averments paragraph 11 of plaintiff's petition (R. 28), admitted by paragraph 4 of answer (R. 60).

It should further especially be observed that it appears from a report of the action of City Council, when considering the application of The John P. King Manufacturing Company for grant of water power, that an effort was made to limit the grant to ten years, but this effort was voted down, and the grant was made without any limitation as to time. See Exhibit D attached to the petition. (R. 44.)

After City Council's action of June 6, 1881, upon the application of The John P. King Manufacturing Company for water pwer, the promoters issued two circulars, one under date of July 2, 1881, and one under date of November 14, 1881, soliciting subscriptions, wherein it was stated that the City would furnish water power at the price of $5.50 per horse power "in perpetuity." (R. 28, 47, 48.) These prospectuses were generally circulated, and, in the nature of things, must have come to the attention of the Mayor and members of City Council. Subscriptions were obtained to the stock of the corporation upon the faith of the grant of water power at $5.50 per horsepower in perpetuity. (R. 17.)

Now, what is the effect of all of these facts and circumstances in construing the contract, and in determining whether or not there was any consideration therefor, and also as to its duration?

Can there be any other conclusion from these facts but that the City Council was anxious to develop the City, and also to secure customers for the water power, and to that end was holding out inducements to persons to establish manufacturing plants which inducements included the offering without limitation of time express or implied water power at a definite rate of $5.50. It had already made express contracts in perpetuity (R. 19, 19-20); it had refused in open Council to place a time limit when a resolution to that effect was issued (R. 44); in the nature of things it must have known of the prospectuses being issued by the promoters of The John P. King Manufacturing Company, which expressly stated that they had been offered the power in perpetuity, and the only fair conclusion is that the City meant to grant a contract for water power in perpetuity, and that prospective manufacturers and customers so understood it.

So much for the facts. We think we can safely say that the defendant's answer concedes the plaintiff's right to have power in perpetuity. Defendants merely deny the perpetuity, or permanency of the rate of charge. In other words, they concede plaintiff's claim to a right which, when it came into existence, was made up of several constituent parts, viz: right to have power, amount to be paid for power, extent of duration of right. It seems to be conceded that at the outset the right included the right to have not only the power, but also to have it at a specified cost; that those two elements existed as a whole or entire right. Now despite that admitted absolute union at the outset, the City now takes the position that after the lapse of what it considers a reasonable time and for reasons that it deems wise in its own interests, it can destroy one of the essen-

tial parts of the original grant or contract and substitute something else in lieu thereof.

This we contend the City cannot do.

The principle that where a contract is silent as to duration, it is for a reasonable time only, and that either party can terminate such contract after the lapse of a reasonable time is not applicable to a contract of the kind now under consideration. With the exception of contracts for personal services every contract is prima facie permanent and irrevocable.

> "Every contract is prima facie permanent and irrevocable, and it lies on a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract from which it is reasonably to be implied that it was not intended to be permanent and irrevocable" . . . "Where a contract is not for personal services, or does not require the imposing of special confidence, and does not fix a limit of its duration, it cannot be regarded as terminable except by mutual consent."
>
> 13 Corpus Juris 604, par. 629, 630.

> "The case before us is to be differentiated from those which relate to contracts for personal service and special confidence, where there is an implication that the parties intended that it should not be prolonged if either of the parties should become dissatisfied."
>
> McKell vs. Chesapeake & Ohio Ry. Co.
> Circuit Court of Appeals, 6th Cir., Jan. 4, 1910. 175 Fed. 321.

"That the life of a contract should depend on the mere will of either party thereto, without the consent of the other, is a limitation so important and drastic that it is hard to conceive why if the parties intended it they should not express that intention in the contract itself."

Western Union Telegraph Co. vs. Pennsylvania Co.

Circuit Court of Appeals, 3rd Cir., May 2, 1904. 129 Fed. 849.

"A contract between the owner of a tract of coal land and a Railroad Company, by which the land owner agreed to develop mines on his land to a stated capacity, and the Company agreed to build a branch line to the mines, and to purchase the coal produced at the ruling price of certain other coal, which contained no provision as to its duration, was not terminable at the will of one party, but was permanent so long as the stipulated production was maintained."

McKell vs. C. & O. Ry. Co.

Circuit Court of Appeals, 6th Cir., Jan. 4, 1910. 175 Fed. 321.

In discussing the contention of one of the parties that the conditions of a contract if construed to be irrevocable would impose a hardship the Court in the last above cited case said:

"But a more conclusive answer is that it should have been considered by the parties when they made their agreement whether it would impose too great a hardship upon them. The decisions upon the question we are now dealing with are not very

numerous, but some of them are of high authority, and if not controlling, are very persuasive."

Ibid.

On a rehearing of the McKell case the former decision was affirmed, and on the second hearing the Court used the following language:

"It is further urged that there was no time fixed for the duration of the contest and that in such case either party may determine it upon giving notice of its intention to the other. It is not true that such a result will always follow. It would not follow where the nature of the contract shows that the parties intended it to be permanent."

McKell vs. Chesapeake & O. R. Co.
Circuit Court of Appeals, 6th Cir., Jan. 9, 1911. 186 Fed. 39, 45.

The case of the Franklin Telegraph Company vs. Harrison, et al., 145 U. S., 459, had under consideration a contract which had no express time limit, and the Court held that it was perpetual. Among other reasons as to why the Telegraph Company desired to terminate the contract was that the compensation being paid was not compensatory, and it could not afford to perform the service in view of the extra costs, etc., and as the contract fixed no limit of continuance the Company would terminate it.

The Court stated, on page 469, that if it was intended that after ten years the Harrisons only became tenants from year to year, it seemed to the Court that the contract would have distinctly so stated.

Again, in the same case, on page 471, is the following language:

> "It is said that the contract turns out to be a hard one for the Telegraph Company, and that a court of equity should not aid in its enforcement."

The Court declined to recognize this as a sufficient ground, entering into quite a discussion of the matter, and citing numerous authorities to which attention is invited.

> The Franklin Tel. Co. vs. Harrison, 145 U. S. 459, 471, 473.

In one of the cases cited in the Franklin Telegraph Company case, it was held that the fact that there might be increased expenses was one in reference to which parties took their chances, and that it would seem that a court of equity does not insist upon equivalents in contracts where parties have equal competence, but when undue advantage is taken it will not enforce the contract. It may be an improvident contract, but improvidence or inadequacy does not determine a court of equity against decreeing specific performance.

> The Franklin Tel. Co. vs. Harrison.
> 145 U. S. 459, 472.

In a case involving the duration of a franchise granted an interurban electric railroad by a Board of County Commissioners, the Supreme Court announced the following principle:

> "Where there are no controlling provisions in state constitution or statutes, and no prior adjudi-

cation by its courts to the contrary, we have distinctly held that franchises like the one under consideration are contracts not subject to annulment as here undertaken."

Northern Ohio Traction & Light Company vs. State of Ohio, Ex Relatione, etc., 245 U. S. 574, 585.

A contract between a Telegraph Company and a Railroad Company, by which the Railroad Company furnishes a right-of-way, and the Telegraph Company furnishes telegraphic service, is perpetual in nature, and not subject to termination at the will of either party.

Western Union Tel. Co. vs. Pennsylvania Co. Circuit Ct. of Appeals, 3rd Circuit, May 2, 1924. 129 Fed. 849.

Quoting from the last cited case:

"The essential nature of the service is such as to indicate that permanency in contractual relations was intended by the contract under which these parties have lived for nearly half a century" . . . "If a power of revocation was intended by the parties to this contract, it would seem the natural and logical course that such power should have been expressly incorporated in the contract itself. Apart from these contracts which from their inherent nature imply a power of revocation, it would seem that the **intention of parties to an agreement that it should be perpetual and without limit as to duration could not be more properly expressed than by silence as to any time limit or power of revocation.** Reason and authority would seem to concur in support of this doctrine, and we find no direct and controlling authority to controvert it."

"Apart from contracts which from their inherent nature imply a power of revocation, **the silence of the parties as to duration, indicates an intention that the contract should be perpetual**" and "where no limitation is expressed in the agreement, neither party can terminate it without the consent of the other, unless the making of the contract itself indicates that the parties must have intended some other determination."

Rosmassler vs. Spielberger. 270 Pa. Rep. 30.

Treating the conversations, letters and resolutions and action of the parties as a grant, the silence as to duration of the grant must be construed as a grant in perpetuity.

"A parol license without consideration to use the waters of a stream for a sawmill cannot be revoked at the granter's pleasure when the grantee in consequence of the license has erected a mill."

Rerick vs. Karn. 14 Sergeant and Rawls, 267.

"But a license may become an **agreement** on valuable consideration, as where the enjoyment of it must necessarily be preceded by the expenditure of money, and when the grantee has made improvements or invested capital in consequence of it he has become a purchaser for a **valuable** consideration."

Ibid, page 500.

"A right under a license when not specifically restricted is commensurate with the thing of which the license is an accessory. Permission to use

water for a mill, or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration and survive the erection itself."

Ibid, page 501.

"A parol license is primarily revocable at any time, if its revocation does not harm the person to whom it has been granted, but is not revocable when the licensee has executed it, and in so doing has incurred expense. In such case it becomes an easement running with the land."

Cherokee Mills vs. Standard Cotton Mills. 138 Ga. 856.

"The original parol agreement could not be revoked after it had been executed at the defendant's expense."

Sheffield vs. Collier, 3 Ga. 82.

Of similar import is Mayor and Council of Macon vs. Franklin, 12 Ga. 243.

Defendants contend, however, that even if there is a grant or contract express or implied it is void or voidable by defendants for several reasons.

First, because the City was endowed with the powers and privileges as originally conferred by the Legislature upon the Augusta Canal Company to whose property and franchise the City is successor, and because said Canal Company had the power at any time to change its charges. (R. 55, 56, 58.)

The portions of the Act incorporating the Augusta Canal Company which are pertinent are the following:

"Sec. 4. That the said Managers for the time being shall have full power in the name and behalf of said Company to make all . . . contracts for the use of the water of the same for manufacturing or other purposes."

* * * *

"Sec. 7. Shall have the power to make and enforce such rules and regulations in relation to the use of said Canal, and its waters for navigation or other purpose and to impose and collect such tolls, rent or other charges as they may deem equitable and expedient and which do not interfere with any of the existing contracts or obligations of said Company."

Georgia Laws 1845, p. 138.

It will be seen from the foregoing that in the fourth paragraph of the Act there is clear authority to enter into contracts for the use of water by manufacturing corporations.

Does the use of the word "manufacturing" exclude other subjects of contract, or have the words "other purposes" any significance? Be that as it may, here is a clear power to make a contract.

In Section 7 of the Act power is given to the Board of Managers to enforce rules and regulations "for navigation and other purposes, and to collect such tolls, rent or other charges as they may deem equitable or expedient."

Having in one paragraph given power to contract for manufacturing powers, and in another having given power to make rules and regulations for navigation and

to collect tolls, is it not fair to conclude that Section 7 refers only to powers and duties in connection with navigation of the Canal, and that Section 4 has to do with matters relating to sale of power to manufacturing plants located along the Canal?

This would seem to be the proper construction of the two sections above referred to.

Be that as it may the imposing of tolls, rents, or other charges is limited so as not to interfere with existing contracts or obligations, otherwise with contracts that may have been lawfully made prior to any effort to change or impose a toll.

Certainly it could not be a rational construction of this Act to hold that while the City was empowered to make contracts with manufacturing plants under Section 4, nevertheless under Section 7 it could break such contracts.

Defendants also contend that a contract such as plaintiff insists on would be void because ultra vires so far as the City was concerned.

But unaided by the powers conferred by the Act of 1845 the City of Augusta under general principles of law applicable to municipal corporations could make valid and binding contracts in reference to its water power charges.

It is well recognized that so far as a municipal corporation's governmental functions are concerned, that is so far as it undertakes to perform for the State any of those duties which the State should perform, either directly or indirectly for its citizenry, it has the same immunity from liability that the State itself possesses.

"A contract by a municipality to perform a public duty is ultra vires and void, and a municipality cannot make contracts which would embarrass or control its legislative duties."

28 Cye. 636.

"It is well recognized that so far as its purely governmental functions are concerned—that is so far as it undertakes to perform for the State any of those duties which the State should perform, either directly or indirectly for its citizenry—such as the maintenance of the public morality, peace, safety and health, a City has the same immunity from liability that the State itself possesses. On the other hand as to their other corporate functions, cities are liable just as other corporations are for negligence."

Huey vs. Atlanta, 8 Ga. App. 597, 599.

On the other hand, as to their other corporate functions, cities are liable just as other corporations.

Dillon on Municipal Corporations, 5th Edition, pars. 1647, 1670.

Huey vs. Atlanta, 8 Ga. App. 597.

Adepe vs. City of Thomasville, 9 Georgia App. 880.

Lord vs. Atlanta, 17 Ga. App. 13.

City of Dublin vs. Ogburn, 142 Ga. 840.

"A village in constructing water works and electric light plants, acts in its purely private business capacity, and its measure of liability for material entering into their construction is the same as that of a private individual or corporation under like circumstances."

Village of Oshkosh vs. Fairbanks, Morse & Co., Circuit Court Appeals, 8th Circuit, Sept. 14, 1925. 8 Fed. (2nd Series), 329.

"In operating an electric light plant, furnishing electric light for pay, a City is engaged in a private, non-governmental business, and is liable to one injured through the negligence of its employee engaged in repairing wires."

Adepe vs. City of Thomasville, 9 Ga. App. 880.

"Where a municipal corporation operated a light plant furnishing power and lights to customers and installing necessary appliances for that purpose, and where it placed a switch within a building so carelessly that a fire resulted, and the building was destroyed, it was liable for property so destroyed."

City of Dublin vs. Ogburn, 142 Ga. 840.

"That a municipal corporation, equally with the private one, may be estopped from denying the validity of its contract, made within the general scope of its powers, although not entered into or carried out in the precise or formal manner required by law, is well established, and especially is this true with reference to a contract relating to its proprietary, as distinguished from its governmental functions."

Wykes vs. City Water Co. of Santa Cruz. Circuit Court N. D. California, Jan. 31, 1911. 184 Fed. 752.

"Municipal corporations have two classes of powers, the one governmental, in the exercise of

which their officers may not bind a municipality beyond the terms of their office; the other business or proprietary, in the exercise of which they are governed by the same rules as individuals or private corporations. A City exercises its business and not its governmental power in making a contract to accept the dedication of and to grade streets and alleys within its limits."

Tuttle Bros. & Bruce vs. City of Cedar Rapids. Circuit Court App. 8th Circuit, Feb. 21, 1910. 176 Fed. 86.

"A municipal corporation in respect of its purely business relations as distinguished from those that are governmental, is held to the same standard of just dealings that the law prescribes for private individuals."

Omaha Water Co. vs. City of Omaha. Circuit Court Appeals, 8th Circuit, Nov. 8, 1907. 156 Fed. 922.

Defendant further claimed that the contract was void because without consideration and lacking in mutuality.

There are numerous kinds of considerations:

A consideration may grow out of an undertaking to do something, or an undertaking not to do something; a consideration may consist of a payment, or the consideration may be provided by one person for the benefit of another.

It would constitute a perfectly valid contract for the Mill to have agreed to pay and have paid a lump sum once and for all. It is not essential to the validity of a consideration that it should be represented by regular yearly payments or quarterly payments. One thing that the Manufacturing Company did in the way of a consideration was to expend a million dollars in the City of Augusta in building and putting in operation a Mill. That was what the City was seeking; that was the great thing that it desired.

> "A consideration is valid if any benefit accrues to him who makes the promise, or any injury to him who receives the promise."
>
> Georgia Code 1910, Section 4242.

> "Considerations are distinguished into good and valuable. A good consideration is such as is founded on natural duty and affection, or on a strong moral obligation. A valuable consideration is founded on money, or something convertible to money, except marriage, which is a valuable consideration."
>
> Georgia Code 1910, Section 4243.

> "A promise of another is a good consideration for a promise. So in mutual subscriptions for a common object, the promise of the others is a good consideration for the promise of each."
>
> Georgia Code 1910, Section 4246.

A mutual promise constitutes a good consideration, but is only one of several kinds of good considerations. The mere fact that there might be a lack of mutuality in the water contract might demonstrate the

fact that there was no consideration based on mutuality. Nevertheless that does not negative the proposition that there is not a good or valuable consideration based on other facts and circumstances.

> "If there be a valid . . . consideration for the promise, it matters not from whom it is moved; the promisee may sustain his action though a stranger to the consideration."
>
> Georgia Code 1910, Section 4249.

Reverting to the above cited Code Section 4242, it is there stated that the consideration is valid if any benefit accrues to him who makes the promise, or any injury to him who receives the promise. In the case at bar a benefit resulted to the City in the construction of the Mill. That was a valid consideration and sufficient, and injury resulted to the Manufacturing Company when it expended large sums of money on the faith of the promise, or at least the injury would result if the promise upon the part of the City was not performed.

> "The least consideration will create reciprocity and make a valid contract."
>
> Jernigan vs. Wimberly, 1 Ga. 220.
> Austell vs. Rice, 5 Ga. 472.

We think there can be no question that there was sufficient consideration for the undertaking of the City to supply water power, and there remains only the question for how long the City was under obligation to furnish such water power, which has been fully discussed above.

In response to the contention of defendants that the City in operating the Canal is a public service corporation, and that such bodies cannot make discrimination, we would reply that for many years railroads and other public service corporations regularly made discriminations, and there was no law prohibiting it. This discrimination, though lawful, became so intolerable that regulatory commissions were created and these commissions can control such public service corporations as are by the statute placed under them.

Other public service corporations are still lawfully at liberty to make contracts such as they desire, and the fact that there is discrimination does not affect the legality of the contract. The City in its operation of the Canal as a purveyor of water power, is not controlled by any law or regulatory body as to discrimination.

Nor does the fact of increased cost of labor and material, with the consequent cost of upkeep of the Canal, furnish grounds for avoiding a valid contract or grant. The possibility of changes in operating cost should have been considered by the parties.

> "It may be doubted, however, whether the hardship of the contract is any greater than must have been contemplated when it was made. It is not unconscionable because Ripley obtains a larger profit from it than was at first expected, or because the other party obtains less. Those were contingencies, the possibility of which might have been foreseen. It could not have escaped the thought of the contracting parties that the expense of quarrying might possibly increase, and that the expense

of sawing and preparing for market might either increase or diminish in the progress of time. Of this they took their chances."

Rutland Marble Co. vs. Ripley, 77 U. S. (10 Wall) 339, 356.

That the hardship in the performance of a contract is not sufficient ground for setting aside or avoiding the same is discussed and established in the case of:

Franklin Telegraph Co. vs. Harrison, 145 U. S. 459, 471, 473.

That the new rate of $11.00 is a reasonable charge is beside the question, if the Court otherwise finds that there was a contract.

Defendants in the Courts below cited and seemed to rely strongly upon the case of Texas & Pacific Railway Co. vs. City of Marshall, 136 U. S. 393, as sustaining their contention that there was no right to perpetual enjoyment of a $5.50 rate.

The Court in that case held that the contract meant that in the process of construction of a road, the eastern terminus should be established at Marshall, and that its permanent shops should be there established, but it further held that there was nothing in the contract which meant that the Railroad should keep its terminus and machine shops forever at this point; that the fair meaning of the words "permanent establishment," and of the word "permanent" were not equivalent to "forever" or "existing forever," and in reaching its conclusion all the circumstances of the particular contract were taken into consideration, among others that the plaintiff in error was a common carrier, with public

duties to perform; also the language contained in the letters going to make up the contract, and the benefits which the City desired to obtain, and was entitled to expect, and the Cour held that in that case, under those facts, the purpose of the parties had been accomplished when shops which were **permanent in nature** had been established, and remained in existence for eight years, and the same in reference to the terminus. In that case the City had gotton ample, if not the fullest benefit to be obtained from its donation of bonds to the Railroad. On the other hand, the conduct of the City in raising rates in Augusta inflicts a permanent injury, and if repeatedly persisted in could work ruin to plaintiff's investment.

Likewise in the Courts below Defendants in Error laid great stress upon the case of Millers vs. The City Council of Augusta, 63 Ga. 772, and will probably refer to that case in argument before this Court.

The Millers case, as far as it goes, tends to sustain the view of plaintiff, and in no wise militates against it.

In the Millers case it appeared that there was no express contract to supply a given head of water at a particular mill; that despite this lack of an express contract on this subject, the Court held that the City could not capriciously and without just cause withhold a due supply of water. That is all that is decided by the case. There is the implication that if there had been an express contract to supply a given head of water to a particular mill, that the City would have been bound by that contract. Even in the Millers case, where there was no express contract, it would seem that the City was bound to furnish water in perpetuity if the Millers

desired to take it. In the Millers case, however, there was no express contract in reference to water rent to be charged, nor was there any difference existing at the time between the Millers and the City as to the question of rent, and, therefore, that matter was not decided. The only question decided was the right even when there was no express contract, to have a perpetual supply of water, not diminished in head or quantity, except where the exigencies of repairs, etc., necessarily enforced a temporary interference with the amount. There is not a thing in the Millers case which would militate against the idea of the Canal owner entering into an express contract as to the amount to be charged for water, and the period of time over which that charge should extend. **The perpetual obligation to furnish the water is admitted, even though the Millers were not under any obligation to perpetually take it.** In other words, the City was perpetually bound to furnish water so long as the Millers wished to take it. Is not the further obligation to furnish at a given price in perpetuity entirely in accord with and supported by the same principles as the obligation to perpetually supply water? In fact the question of amount charged is an essential ingredient in the furnishing. If the owner of the Canal had the reserved right to change the price for the water, impliedly or expressly contracted for, it could change the price at any time after short intervals of time and without any limitation as to the extent of change, and thereby render the obligation to furnish water ineffectual by reason of the destructiveness of the rent charged.

If we have satisfied the Court that a contract was made between the plaintiff and the City for the former to be provided with water power in perpetuity at the

rate of $5.50 per horsepower, or that if the facts did not strictly amount to a contract they nevertheless amounted to a grant of a right or privilege, then it would seem to follow as a self-evident proposition that the Supreme Court of Georgia erred in affirming the judgment of the Court below which refused to grant an injunction.

The first three specifications of error amount in effect to a different form of statement of one and the same error, and each relates to the fundamental claim that the Ordinance of the City impaired the obligation of the claimed contract contrary to the Constitution of the United States.

The first specification is in the language used in the twenty-sixth (26th) paragraph of the complaint (R. 33).

The second specification of error is made in the language used in the bill of exceptions to the Supreme Court of Georgia. (R. 14.)

The third specification of error is a re-statement, though in different language, of the proposition that the passage of the Ordinance in question contravenes the Constitutional provision and that the judgment of the lower Court was in error when it held to the contrary under the facts of the case under consideration.

What we have just above stated in reference to the first three specifications in error are applicable to the fourth, fifth and sixth specifications of error. They are merely a repetition in different language of the fundamental proposition contained in all, that the passage

of the Ordinance in question and the enforcing of the same, deprived the plaintiff of its property without due process of law, and that the judgment of the lower Court in holding to the contrary was error.

The fourth specification of error uses in substance the same language as contained in the twenty-seventh paragraph of the original complaint. (R. 33.)

The fifth specification uses the language as set forth in the bill of exceptions to the Supreme Court of Georgia. (R. 15.)

The sixth specification of error is a re-statement, though in different language, of the proposition that the passage of the Ordinance in question contravened the Constitutional provision that the judgment of the lower Court was in error when it held to the contrary under the facts of the case under consideration.

Inasmuch as the error, or the contrary, of the Court below depends upon the existence of a contract or grant, which phase of the case has been fully and elaborately argued in the early part of this brief, plaintiff in error thinks that it is unnecessary, and in fact inappropriate, to further argue the soundness of the six specifications of error, which assign error upon the ground that the lower Court erred in holding that the Ordinance under consideration as applied to the facts of this case was not a law impairing the obligation of a contract, or that the passage and enforcement of the Ordinance did not deprive plaintiff of its property without due process of law.

(13)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

THE JOHN P. KING MFG. CO.,

vs.

CITY COUNCIL OF AUGUSTA and RALEIGH H. DANIEL, MAYOR,

Defendants in Error.

} In Error to the Supreme Court of the State of Georgia.

No. 302.

BRIEF FOR THE DEFENDANTS IN ERROR BY E. H. CALLAWAY, and CALLAWAY & HOWARD, SPECIAL COUNSEL FOR THE CITY COUNCIL OF AUGUSTA and THE MAYOR THEREOF, AND ARCHIBALD BLACKSHEAR, CITY ATTORNEY.

SUBJECT INDEX

	Page
STATEMENT	1
HISTORY OF THE AUGUSTA CANAL	3
LAW BRIEF	9
THERE WAS NO CONTRACT	9
LAW OF THE PLACE	9
CONTRACTS IN PERPETUITY NOT FAVORED BY COURTS	12
AUGUSTA CANAL A QUASI PUBLIC SERVICE COMPANY	21
CASES RELIED UPON BY PLAINTIFF	24
LAW OF LICENSE NOT APPLICABLE	28
UNILATERAL CONTRACT	30
PUBLIC SERVICE CORPORATIONS CANNOT DISCRIMINATE AS TO RATES	37
RATES MUST BE REASONABLE	38
CAN A MUNICIPALITY MAKE CONTRACT IN PERPETUITY?	39
HAS THIS COURT JURISDICTION TO REVIEW IN THIS CASE?	42

TABLE OF CASES CITED

Pages

Appleby v. City of New York, 271 U. S. 364 42
Augusta & Savannah R. R. Co. v. Augusta Southern R. R. Co., 96 Ga. 562 30
Abbott's Municipal Corporations, 3rd. 41

Buick Motor Co. vs. Thompson, 138 Ga. 282 30
Burton vs. Great Northern Ry. Co. 9th Exchequer 507 32
Barber 18th (N. Y.) 317 33
Baldwin vs. Kansas City M. & D. R. R. Co., 20 So. Rep. 349 20

Coffin vs. Landis, 46 Pa. 426 ..... 16, 17, 18
Chattanooga R. & C. Ry. Co. vs. Cincinnati N. O. & T. P. R. R. Co., 44 Fed. 456 ..... 19, 20
Chitty on Contracts 16
Clark on Contracts 33
Cooley vs. Moss, 123 Ga. 707 34
City of Scranton vs. Public Service Co., 268 Pa., 192 38
Corpus Juris, 13th 9, 10, 11, 12, 24

Doeblar vs. Waters, 30 Ga. 347 31
Dorsey vs. Packwood, 53 U. S. 126 ..... 32, 33

Echols vs. New Orleans Ry. Co., 52 Miss 610 ..... 15, 16

Franklin Tel. Co. vs. Harrison, 145 U. S. 459 ..... 26, 27
First Dillon's Municipal Corporation, 4th Ed 40

Georgia Pub. Acts 1845, p. 138 3
Georgia Pub. Acts 1849, p. 85 3
Georgia Civil Code 1910 Sec. 4241 ..... 30, 32
Georgia Civil Code 1910, Sec. 4246 ..... 30, 32
Georgia Civil Code 1910, Sec. 892 40

Harrison vs. Wilson Lumber Co., 119 Ga. 6 34
Hazelhurst Lumber Co. vs. Mercantile Lumber & Supply Co., 166 Fed. 191 ..... 36, 37
Horkan vs. Moultrie, 136 Ga. 561 ..... 39, 40, 41

Irish vs. Dean, 39 Wis. 562 18

James McCallum Printing Co. vs. Graphite Compendium Co. 150 Mo. 383; 130 S. W. Rep. 836 13
John 4th, 235 33
Jones vs. Newport News Co., 65 Fed. 736 ..... 14, 17

Pages

Mississippi Logging Co. vs. Robson, *69* Fed. *773* 17, 18

Mercantile Trust Co. vs. Columbus S. & H. Ry. Co., 90 Fed. 149 ..... 18, 19

Millers vs. City Council of Augusta, 63 Ga. *772* *21*, *22*, *23*, *24*, *28*, *29*, 41

Morrow vs. Southern Express Co., 101 Ga. 810 ..... 31, *32*, 33

McCaw Mfg. Co. vs. Felder, 115 Ga. 411 33

McCullough Dalzell Crucible Co. vs. Philadelphia, *223* Pa. *336*; *72* Atl. Rep. *633* 16

McKell vs. Chesapeake R. R. Co., 175 Fed. 321 ..... *25*

Northern Pacific Ry. Co. vs. Wall, *241* U. S. *87* 10

N. C. Public Service Co. vs. Southern Power Co., *282* Fed. *837* 38

New Jersey Equity 40, *422* 33

Postal Cable Tel. Co. vs. Cumberland Tel. Co., *177* Fed. *726* 38

Pond on Public Utilities, 3rd Ed. *201* 13, 38

Risley vs. City of Utica, *179* Fed. *875* 13, 14

Southern Surety Co. vs. Oklahoma, *241* U. S. *587* 10

State vs. Tampa Water Works, 65 Fla. 658; 19 L. R. A. (N. S. 183) 10

Story on Contracts *16*, 33

Stonega Coke & Coal Co. vs. Louisville & Nashville R. R. Co., 106 Va. *223*; 55 S. E. 551; 9th L. R. A. (N. S.) 1184 ..... 16, 17

Swindell & Co. vs. First National Bank, 121 Ga. 714 34

Santaella & Co. vs. Otto F. Lange Co., 155 Fed. 719 ..... *36*

State vs. Bell Telephone Co., *23* Fed. *539* *38*

Tarver vs. Mayor of Dalton, 134 Ga. *462* 40, 41

Texas Ry. Co. vs. City of Marshall, *136* U. S. *393* 14, 15, *27*

Trustees vs. City of Jacksonville, 61 Ill. App. *199* 40

Texas & Pac. Ry. Co. vs. Scott, *77* Fed. *726* 17, 18

Wright vs. Computing Scale Co., 47 Wash. 107, 91 Pac. Rep. 571 11

Williston on Contracts Vol. I, p. *38* *12*

Western Union Tel. Co. vs. Pa. R. R. Co. *129* Fed. *849* *25*, *26*

Windell *21*, 134 33

Wilcox & Gibbes Sewing Machine Co. vs. Ewing, 141 U. S. *627* *36*

Walker Mfg. Co. vs. Swift & Co., *200* Fed. *529* *36*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

THE JOHN P. KING MFG. CO.,

vs.

CITY COUNCIL OF AUGUSTA and RALEIGH H. DANIEL, MAYOR,

Defendants in Error.

In Error to the Supreme Court of the State of Georgia.

No. 392.

BRIEF FOR THE DEFENDANTS IN ERROR BY E. H. CALLAWAY, and CALLAWAY & HOWARD, SPECIAL COUNSEL FOR THE CITY COUNCIL OF AUGUSTA and THE MAYOR THEREOF, AND ARCHIBALD BLACKSHEAR, CITY ATTORNEY.

STATEMENT

This suit was brought by the John P. King Mfg. Co. against the City Council of Augusta and the Mayor thereof, to restrain the City from enforcing an Ordinance Approved August 20th, 1924, fixing the rate and price of water power furnished its customers from the Augusta Canal for the period beginning March 7th, 1926 and ending March 7th, 1936, at $11.00 per H. P. for day use and $3.50 per H. P. for night use per annum (P. R. 51-53).

The application for the restraining order applies only as to 1244.3 H. P. which the plaintiff claims that it has the right to use in perpetuity at the former rate of $5.50 per H. P. for day use. The 1244.3 is the amount

of power which the plaintiff began to use and take from the Canal according to its petition (par. 15) on December 1st, 1883, upon the completion of its mill (P. R. 29).

As to the balance of the H. P. now being used by the plaintiff from the Canal, namely: 1683.8 H. P., plaintiff has already entered into contracts with the defendant in pursuance of the terms of the Ordinance Approved August 20th, 1924, agreeing to pay the rates fixed by that Ordinance of $11.00 per H. P., for day use and $3.50 per H. P. for night use. The plaintiff's concession as to the 1683.8 H. P. is based upon the facts stated in its petition, that after it had built its factory and commenced to use water power from the Canal to the amount of 1244.3 H. P., on December 1st, 1883 the City Council of Augusta thereafter, on March 4th, 1886 (P. R. 30) passed an Ordinance fixing the rate or price per H. P. for water from the Canal for a period of 20 years, at the rate of $5.50 per H. P., which Ordinance limited contracts for the use of such power at that price, to a time specified in the Ordinance. (See Par. 19 of plaintiff's petition, (P. R. 30).

But the plaintiff contends that having built its mill and plant and commenced to use water from the canal as power, while the rate of $5.50 was the prevailing current rate charged for such power, and having applied for and obtained water power from the Canal to the extent of 1244.3 H. P. prior to the passage of the Ordinance of 1886, it has a right, in perpetuity, to use such water power from said Canal at said price or rate of $5.50.

The sole question in this case is whether the plaintiff has a valid, legal contract with the City Council of Augusta for the use of 1244.3 H. P. from the Augusta Canal at a rate or price of $5.50 per H. P. per annum in perpetuity, the obligation of which contract is impaired by the adoption of the Ordinance by the City Council of Augusta of August 20th, 1924 fixing

the rate or price per H. P. per annum for a period of ten years, beginning March 7th, 1926, at $11.00 per H. P. for day use, and $3.50 per H. P. for night use.

The plaintiff expressly admits in par 16 of its petition (P. R. 29) that it has no formal contract with the City Council of Augusta entitling it to the use of said 1244.3 H. P. at the rate of $5.50 per H. P. in perpetuity (P. R. 29), but it claims that the negotiations whereby it built its plant on the banks of the Canal for the purpose of using said water power from the Canal as its motive power, were at a time when the current rate was $5.50 per H. P., and amounts to an implied contract in perpetuity at such rate.

The defendant denies that the plaintiff ever had a contract with the City Council of Augusta under the facts stated in its petition, either express or implied, for obtaining water power from the Augusta Canal at a rate of $5.50 per H. P. in perpetuity.

HISTORY OF THE AUGUSTA CANAL.

Under the original Act of the General Assembly of Georgia Approved December 27th, 1845, (Pub. Acts 1845 p. 138) incorporating the Augusta Canal Company, in the 7th Section thereof, it is provided:

> "That the Board of Managers for the time being shall have power to make and enforce such rules and regulations in relation to the use of said Canal and its waters, for navigation or other purposes, and to impose and collect such tolls, rent, or other charges, as they may deem equitable or expedient, and which do not interfere with any of the existing contracts or obligations of said company."

Under the Act of the Legislature of Georgia approved December 19th, 1849 (Pub. Acts 1849-50, p. 85) referred to in plaintiff's petition par 4 (P. R. 24) authorizing the City Council of Augusta to purchase and take over said Canal, in Section 2 thereof it was expressly pro-

vided that upon such purchase and conveyance, the City Council of Augusta should be vested with all of the power, authority and privileges conferred on said company by the Act incorporating it, and shall be subject to all of the liability therein prescribed.

So that the powers conferred by the organic act upon the Board of Managers for the time being, to make and enforce such rules and regulations in relation to the use of said canal and its waters for navigation and other purposes, and to impose and collect such tolls, rent or other charges as they may deem equitable or expedient and which do not interfere with any of the existing contracts or obligations of the company, were expressly conferred by the Act authorizing the City Council to purchase and become the owner of the Canal, upon said City Council.

The petition in par. 6 thereof (P. R. 25) sets forth the first Ordinance adopted by the City Council of Augusta in reference to said Canal, as having been adopted on the 5th day of February, 1872, reading as follows:

> "That from and after the passage of this Ordinance, all capital invested hereafter in the manufacture of cotton, yarn, or of cotton and woolen fabrics, shall be exempted from taxation for ten years from the time the wheels of such manufacturing establishments shall be started, provided the said manufacturing establishments shall locate within the City limits and derive their power in whole from the waters of the Augusta Canal, for which water said mills and manufacturing establishments must pay **at the current established rates.**"

In pursuance of powers conferred by previous Acts of the Legislature of Georgia, the Augusta Canal Company, by the Commissioners, conveyed the Canal to the City Council of Augusta on July 6th, 1877 (P. R. 20).

The next Act of the City Council of Augusta in reference to the Canal and rates to be charged for water, was the Ordinance of April 5th, 1880, attached as Exhibit "B" to plaintiff's petition (P. R. 42) which is as follows:

> "Sec. 1. BE IT ORDAINED by the City Council of Augusta, and it is hereby ordained by authority of the same, that from and after the passage of this Ordinance, the rates for horsepower for water from the Augusta Canal shall be $5.50 for mills of any and all kinds, **to be contracted for as at present required."**

The next Ordinance of the City Council of Augusta in reference to rates or charges, was adopted on March 4th, 1886 par. 17 of Plaintiff's petition, (P. R. 30), which provided: **"That for twenty years** the rate charged for waterpower of the Augusta Canal shall be $5.50 per H. P. per annum for all mills and factories of every kind."

This Ordinance is set out in full (P. R. 20-21) and the last paragraph of the Ordinance on page 21 is as follows:

> "No person or corporation shall be entitled to the benefits and conditions of this Ordinance until he or it shall enter into a contract with the City Council of Augusta, which contract shall contain the terms of said Ordinance."

The same provisions are provided in Sections 252-254 of the City Code of Augusta (P. R. 22) which extends the rates of $5.50 per H. P. per year for the period of 20 years beginning March 7th, 1906 and requires persons using the water at these rates to enter into contracts.

The petition, in par. 12 (P. R. 28) alleges that the John P. King Mfg. Co. was incorporated on the 31st day of May 1881 for a period of 20 years. At that time

the Ordinance of April 5th, 1880, fixing the price of waterpower to all manufacturers at $5.50 per H. P. was in operation. The Ordinance prescribed no length of time during which said rate would prevail, but expressly required the users of water under the Ordinance to enter into cotracts with the City,—the presumption being that the contract would specify the length of time. The plaintiff signed no written or formal contract, according to its admissions in paragraph 16 of the petition (P. R. 29).

In none of the correspondence between hte promoters or officers of the plaintiff or of the officers of the City Council of Augusta, is there any mention of any length of time for which the contract for the use of water at the rate named, should be made. In fact no contract was made, but according to the 15th paragraph of plaintiff's petition (P. R. 29) the plaintiff put in operation its manufacturing plant on December 1st, 1883, and from that time continuously down to the time of this suit actually took and used 1244.3 H. P., paying therefor the sum of $5.50 per H. P.

The only mention of the word "perpetuity" in reference to said rate or price of $5.50 per H. P. is contained in Exhibits "J" and "K" to plaintiff's petition (P. R. 47-48) and these two Exhibits are letters from Charles Estes, one of the promoters of the Jno. P. King Mfg. Co. before the same was constructed, sent out to prospective subscribers to the capital stock, one dated July 2nd, 1881, the other dated November 14th, 1881. Each of the letters merely stated that they had the City's proposition to furnish the water power they might need at the low price of $5.50 per H. P. in perpetuity.

Of course it could not be seriously contented that these letters of promoters would commit or bind the City Council of Augusta, as it does not appear from any of the correspondence or negotiations that City Council of Augusta had made any such proposition or had in any manner used the word "perpetuity" in con-

nection with said rate, but in every reference thereto on the part of the City Council, the $5.50 per H. P. had been referred to as the prevailing or current rate. Even in these letters of the promoters, as pointed out by the Judge of the Superior Court of Richmond County in his decision (P. R. 69) there is no statement that the John P. King Mfg. Co. had accepted the proposition which it is claimed in the circulars had been made by the City Council of Augusta or that the John P. King Mfg. Co. ever intended to accept water at such rate and for such length of time.

It seems to follow from the above, that the plaintiff has no express contract, by its admission in par. 16 of its petition (P. R. 29). It also seems that all the facts in the record which would amount to implications would be against a contract in perpetuity to furnish plaintiff waterpower at a rate of $5.50 per H. P. These are as follows:

The 7th Section of the Act incorporating the Canal Company, December 27th, 1845 (P. R. 55) providing that "the Board of Managers for the **time being** shall have power to make and enforce such rules and regulations in relation to the use of said Canal and its water for naigation or other purposes, and to impose and collect such tolls, rents, or other charges as they may deem equitable or expedient, and which do not interfere with any of the existing contracts or obligations of said company."

The Ordinance of the City Council of Augusta, adopted the 5th day of February 1872 (P. R. 25) providing that the use by mills and manufacturing establishments must be **at the current established rates.**

The Ordinance of April 5th, 1880 set forth as Exhibit "B" to plaintiff's petition (P. R. 42) fixing the rate at $5.50 for mills of any and all kinds, **to be contracted for as at present required.**

The Ordinance of March 7th, 1886 (P. R. 20) prescribing the then existing rate of $5.50 per H. P. for a period of 20 years.

All of these are implications against any contract or understandnig that said rate was to prevail in perpetuity.

Of course these implications would not be effective against plaintiff if it had ever entered into an express contract with the City Council of Augusta; but in the absence of an express contract and upon the failure of the plaintiff to enter into an express contract as required by the Ordinance of April 5th, 1880, which was before it began to take and use the power in December 1883, strongly negatives the idea of any contract in perpetuity for the prevailing rate, by implication.

When to this is added the fact that the Ordinance of March 7th, 1886, requiring users of water from the Canal to enter into contracts and limiting the period at the rate of $5.50 per H. P. to a period of 20 years from March 7th, 1886, which, by its terms, necessarily covered and applied to the 1244.3 H. P. now in controversy and which the plaintiff was using up to the passage of that Ordinance, as well as the additional water power which it obtained thereafter, and with no protest at that time against the ordinance limiting the time for which the prevailing rate was to continue, presents the strongest of presumtions that neither the plaintiff nor the City Council of Augusta at that time understood that the Plaintiff had a contract in perpetuity at $5.50 per H. P.

It is true that a contract was made by the Augusta Canal Company and the City Council of Augusta as guarantor, on one side, and the Augusta Factory as the user of water power, on the other, dated the 1st of January, 1875 (P. R. 19-20) which fixed the rate in perpetuity but that was an express, written, contract, executed by both parties, and if the contract was other-

wise legal, it bound the Augusta Factory by express language to take the water and pay for the same the sum named per year, forever. In other words, this was no unilateral contract. It not only bound the Canal Company to furnish the water in perpetuity, but bound the Augusta Factory to take it and pay for it at the price named, in perpetuity, or forever, and the promise of the Augusta Factory was at least a good consideration for the promise of the Canal Company. But there is nothing like that in the plaintiff's claim of a contract. It has never promised to take the water or to pay for the water in perpetuity. In other words, what it is undertaking to set up by implication, is a unilateral contract, not in writing, and based upon no consideration.

Therefore, it is not surprising that upon this record, the Supreme Court of Georgia affirmed the decision of the trial court (P. R. 7, 8 and 9) in holding that "considering the conversations and correspondence between City Council of Augusta and plaintiff respecting the alleged contract, in the light of the charter powers of the City in acquiring the Augusta Canal and the acts of the parties with reference thereto, a contract to furnish water power by the former to the latter at a specified rate, perpetually, is not made out."

LAW BRIEF

THERE WAS NO CONTRACT.

It was admitted in the plaintiff's petition that there was no formal or express contract to use water power at a rate of $5.50 per H. P. in perpetuity.

If there was any such contract, it must be an implied contract, and yet all of the facts and circumstances relied on as showing such a contract are against a contract in perpetuity.

LAW OF THE PLACE.

In 13th Corpus Juris, page 560, the text is as follows:

"The law of the place where the contract is entered into at the time of making the same, is as much a part of the contract as though it were expressed or referred to therein."

This is supported, among other citations, by the case of Northern Pacific Ry. Co. vs. Wall, 241 U. S. 87, where the 1st syllabus is as follows:

"Laws, in force at the time and place of the making of a contract, and which affect its validity, performance and enforcement, enter into and form a part of it, as if expressly referred to or incorporated therein."

This case is cited with approval in the case of Southern Surety Co. vs. Oklahoma, 241 U. S. p. 587.

The text in 13th Corpus Juris continues as follows:

"The parties are presumed to contract with reference to the place of contract. If the contract is valid there, it is valid everywhere. The lex loci contractus controls as to the nature, construction and interpretation of the contract.

"Where the law authorizes regulation of services rendered the public, such law becomes a part of and controls contracts providing for public service."

The case cited in support of this text is that of State vs. Tampa Water Works, 65 Fla. 658, also reported in 19 L. R. A. (N. S.) 183, where the headnotes are as follows:

"14. Provisions of law applicable to the subject matter of contracts, are parts of the contract, whether so expressed or referred to in the contract or not."

"15. Where the law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts providing for the public service."

In the same volume of Corpus Juris on page 561, it is stated that City Ordinances have been held to come within the rules just stated.

This text is supported by the first headnote in Wright vs. Computing Scale Company, 47 Wash. 107, 91 Pac. Rep. 571.

But the above recited principles of law necessarily have very much more force where one of the contracting parties is a municipal corporation and can only contract by ordinance or resolution. As none of the ordinances or resolutions of City Council of Augusta intimated or suggested that the rate of $5.50 per H. P. was to be in perpetuity, but in every instance spoke of the rate as a current or prevailing rate, clearly indicated that the rate would be subject to change from time to time.

The Ordinance of April 5th, 1880 enacted before the plaintiff began to accept water from the Canal, while it fixed the prevailing rate at $5.50 per H. P., expressly provided that he water was **"to be contracted for as at present required."**

Unquestionably had the plaintiff entered into a contract the time for the duration of the contract would have been designated therein. But the plaintiff did not enter into a contract with the City, and contented itself as soon as its mill was completed in December, 1883, to draw water at the prevailing rate without an express contract.

Whether or not the City Council would have entered into a contract with the plaintiff at that time to furnish it water in perpetuity at $5.50 per H. P., we do not know, and the courts cannot speculate on the subject. Whether the plaintiff would at that time have been willing to enter into a contract with the City Council to take and pay for water in perpetuity, we do not know, and the courts cannot speculate. It seems sufficient to say that the plaintiff has never obligated itself to

take water from the Canal at the price named and pay said price of $5.50 per H. P. in perpetuity. There can be no dispute of that fact and without such a promise on the part of plaintiff, there could have been no valid contract.

CONTRACTS IN PERPETUITY NOT FAVORED BY COURTS

If there was any express contract in this case reduced to writing and signed by the parties, it would be a proper subject matter for the courts to determine whether, from all of its terms and conditions, it could be enforced in perpetuity. But there being no such contract, and the plaintiff being forced to rely entirely upon implication to establish the perpetuity of the rate, it would seem to be purely by implication, if at all.

It is said in 13th Corpus Juris page 604 that:

> "A construction conferring a right in perpetuity will be avoided unless compelled by the unequivocal language of the contract. . . . So where no time limitation is inserted in a contract for performance of services, or the furnishing of commodities, the contract is regarded as terminable by either party on reasonable notice, and no cause need be assigned."

In Williston on Contracts, Vol. 1 page 38, the author discusses this subject as follows:

> "A promise contained in an offer may not specify exactly the time at which performance is to be made, and may not contemplate the exact definition by the acceptor, and thus the ultimate agreement may be as indefinite as the offer. In such a case it is necessary first to construe the promise in the light of all surrounding circumstances and with reference to its subject matter in order to ascertain the intention of the parties. It may be that so construed, the promise means perpetual performance, but it

may mean performance is to begin within a reasonable time, or be continued for a reasonable time; or it may mean that the time was simply left indefinite, with the expectation that the parties might continue performance as long as they pleased, or that they would subsequently settle that term of the promise. It is in this last class of cases that the question of indefiniteness can arise. **It is not often that a promise will properly be construed as calling for perpetual performance.** Only in such negative promises as to forbear suit, or not to carry on a business or occupation, is so broad a construction likely to be permissible. More comonly the true construction will mean some period short of infinity. In such cases, unles the circumstances show a contrary intention, the courts will construe a promise which does not in terms state the time of performance as intending performance in reasonable time."

In the case of James McCallum Printing Co. vs. Graphite Compendium Co., 150 Mo. 383, 130 S. W. Rep. 836 on page 838, the court used this language:

"Courts are prone to hold against the theory that a contract confers a perpetuity of right or imposes a perpetuity of obligation. Yet it seems to be the law of this State that where the intention to do this is **unequivocally expressed,** the contract will be upheld.

In Pond on Public Utilities, 3rd, Ed. par. 201, the text is as follows:

"Where, however, the duration of the contract is not fixed, it will not be held to be perpetual, if in effect it amounts to an agreement which may be terminated at any time on reasonable notice by either party."

There is cited in support of this text the case of Risley v. City of Utica, 179 Fed. Rep. 875, where the 4th headnote is as follows:

"A contract between a City and a Water Company fixed no time for termination thereof, but provided that the City should pay at the rate and on the basis stated, so long as the company should supply water. Held, that the City could terminate the contract on giving due and reasonable notice of its election so to do."

The 5th headnote is as follows:

"The contract not being mutually enforceable, neither party could compel specific performance for all time."

The folowing cases are also pertinent and applicable: In Jones vs. Newport News Co., 65 Fed. Rep. 736, where the present Chief Justice then on the Circuit Court of Appeals rendered the decision, the suit was brought to prevent the railroad from abandoning a switch which it had constructed under agreement with the owner, on the condition that he would build a coal tipple and a trestle therefrom to the railroad company's track. The 3rd headnote in this decision is as follows:

"An agreement by a railroad company, with one owning land adjacent to its track, that, if he would build a coal tipple and a trestle therefrom to its track, it would construct a switch thereon, and thereafter deliver coal to him there, does not contain an implication that the switch shall be perpetual."

In the body of the decision the court held:

"It is not alleged that either the defendant or its predecessor agreed to keep the switch in the main line for any definite time, or that either expressly agreed to keep it there forever. The plaintiff contends that nothing having been said as to the time, the implication is that the switch was to be maintained at all times. That is, forever. Such a construction is quite at variance with the views of the Supreme Court as expressed in Texas Ry. Co. v. City of Marshall, 136 U. S. 393.

In the case of Texas Ry. Co. vs. Ctiy of Marshall, 136 U. S. 393, the City of Marshall had given a large tract of land and donated to the Railroad Company a large number of City bonds, on condition that the Railroad Company would permanently establish its eastern terminus and Texas office at the City of Marshall, and also establish and construct at said City the main shops and car works of the railway company. It appeared that the railroad company did establish its eastern terminus and Texas office at Marshall, and did construct and locate there its main machine shops and car works, and so maintained them during a period of 8 years, and at the end of that period the railroad company removed its office and shops to another city a considerable distance from the City of Marshall. The suit was brought by the City of Marshall to enjoin the Railroad Company from removing its shops because of its contract. The Supreme Court held that the contract was satisfied by the actual location of the terminus, offices, depot and shops at Marshall, and by maintaining them for 8 years. In that case the court held that the word "permanent" contained in the agreement did not mean "forever", or "lasting forever" or "existing forever", but that he language used was to be considered according to its nature and its relation to the subject matter of the contract.

In the case of Echols vs. New Orleans Ry. Co., 52 Miss. 610, the Supreme Court of Mississipi was construing a contract to supply cord wood to a railroad company without fixing a time for its termination, and the court said:

> "Perpetual contracts of this character will not be tolerated by the law, or rather will not be enforced as imposing an eternal and never ending burden. An agreement to furnish a particular commodity at a specified price without specification as to time, will be construed either as terminable at pleasure, or implying that the thing to be done shall be ter-

minated within a reasonable time. Any other theory is immoral, a practical impossibility, and, if, indulged in by the courts, could not be enforced by the ordinary concerns of life. Chitty on Contracts 11 Am. Ed. 1062, and Story on Contracts Sec. 21."

In the case of McCullough Dalzell Crucible Co. v. Philadelphia reported in 223 Pa. 336; 72 Atl. Rep. 633, the court said:

"The general principle that contracts without time limit, are terminable on reasonable notice by either of the parties, is sustained in Coffin vs. Landis, 46 Pa. 426, where the question at issue was whether such revocation constituted a breach."

The headnote in this case is as follows:

"A natural gas company agreed, in consideration of a right-of-way, to furnish gas to the grantor at a certain rate. The contract was indefinite as to time, and after may years conditions changed so that the gas company, to cover the cost of producing the gas, which had greatly increased, was compelled to increase its rates to other customers. Held, that it could terminate the contract on reasonable notice."

In Stonega Coke & Coal Co. vs. Louisville & Nashville R. R. Co., 106 Va. 223, 55 S. E. 551, and reported in 9th L. R. A. (N. S.) 1184, the headnote is as follows:

"An agreement by a railroad company to transport cars over a branch road to and from a mine, free of charge, in consideration of the mine owners developing the property and constructing the branch without any stipulation as to its duration, may be terminated by the railroad company at any time upon reasonable notice."

In the body of the decision the court uses this language:

"The contract sued on was one for the rendition of services on the part of the railroad company. There is nothing said in the agreement as to the time during which it should continue. Does it, when considered in connection with the circumstances under which it was made, furnish the means of determining its duration This is essential because when a contract calls for the rendition of services, if it is so far incomplete as that the priod of its intended duration cannot be determined by a fair inference from its provisions, either party is ordinarily at liberty to terminate it at will on giving reasonable notice of his intention to do so. This is the statement of the general rule as made by the court in Mississippi River Logging Co. vs. Robson, 69 Fed. 773."

In the decision the court quotes from the case of Coffin vs. Landis, 46 Pa. 426 as follows:

"If it were admitted, as said by Judge Strong in Coffin vs. Landis, 46 Pa. 426, that neither of the parties contemplated a severance of the relation formed by the contract at the will of the other party, it does not follow that we are at liberty to treat the agreement as containing a covenant against it. That would be to make an expectation of results equivalent to a binding engagement that they should follow."

The court also cites and quotes from the case of Jones vs. Newport News and M. V. Co., 65 Fed. 736 cited above.

In Texas & Pacific Ry. Co. v. Scott, 77 Fed. Rep. 726, decision by the Fifth Circuit Court of Appeals, the headnote is as follows:

"At the end of 36 years, the depot was abandoned, for reasons connected with the company's interests and the public convenience. Held, that the contract between plaintiff and the railway company, even

> if valid, did not bind the railway company to keep up the depot forever, but that maintaining it for 36 years, and until the company's interest and public convenience required its abandonment, was a substantial compliance with the terms of the contract."

And on page 731 in the body of the decision the court used this language:

> "It canot be true that an agreement on the part of a railroad company to establish a station at a particular point, is an agreement to keep it there forever. It must be that such an agreement is made subject to the general exigencies of business, to public interests, and to the change, modification, and growth of transportation routes, as these may affect the requirements of the railway company's business."

In the case of Mississippi Logging Co. v. Robson, by the Eighth Circuit Court of Appeals reported in 69th Fed. 773, the court, while holding that the contract in that case could not be terminated, anounced this generay principle, apearing at the top of page 780:

> "Nevertheless, the important question remains whether the contract, when considered in relation to the circumstances under which it was made, furnishes the means of determining its possible duration. This inquiry is essential because when a contract calls for the rendition of services, if it is so far incomplete that the period of intended duration cannot be determined by a fair inference from its provisions, either party is ordinarily at liberty to terminate it at will on giving reasonable notice of his intention to do so. Citing Irish vs. Dean, 39 Wis. 562 and Coffin vs. Landis, 46 Pa. St. Rep. 426 to 430."

In Mercantile Trust Co. vs. Columbus S. & H. Ry. Co. which was a decision by the Circuit Court for the

Southern District of Ohio, 90 Fed. Rep. 149, the present Chief Justice of this court rendering the decision, the 2nd. headnote is as follows:

> "Neither a railroad company nor the receiver, in the absence of an express contract, can be compelled to maintain and operate a switch or spur from its line for the use of private parties in the shipment of their products at a loss, or when its operation cannot be rendered safe without considerable expenditure of money."

In Chattanooga R. & C. Ry. Co. vs. Cincinnati N. O. & T. P. R. R. Co., from the Circuit Court for the Eastern District of Tennessee, reported in 44th Fed. 456, the 3rd headnote is as follows:

> "A contract between railroad companies by which one company allows the other to use its freight depot and tracks in consideration of rent at a fixed rate per ton and per car, without any provision as to the length of time that the contract is to remain in force, may be rescinded by either party at any time on reasonable notice."

In the body of the decision on page 458 the court used this language:

> "Complainant insists that the contract is permanent and perpetual and can only be terminated by the mutual consent of the parties; or, if it be not such a contract, it is one running from year to year. The question has receitly been settled by Judge Jackson of this Circuit in the case of B. & O. R. R. co vs. Ohio & M. R. Co., in the Southern District of Ohio (no opinion filed). The B. & O. R. R. Co. did an express business. On the 29th day of September 1884 it made an agreement with the Ohio & Mississippi Ry. Co. that the last named company should furnish to the other company cars and other facilities for conducting and carrying on the express business on the lines of the Ohio & Mississippi Co. The

contract made no provision as to how long it should continue, or how it should be terminated. In this respect it was like the one in controversy here."

The court then, after quoting an extract from the contract between the parties, used this language:

"After the foregoing contract had been in operation for some years and the express company of the Baltimore & Ohio R. R. Co. had established and opened offices all along the lines of the Ohio & Mississippi Co., the latter company threatened to terminate the contract, and took action to that end. The Baltimore & Ohio Company filed a bill to enjoin the other company from disregarding and terminating said contract by withdrawing its cars and other facilities from the complainant in that bill and giving the express matter to some other company. There is no clause in the contract under our consideration similar to the paragraph quoted from the Ohio case, and yet that bill, presenting a stronger case than the one here, was dismissed upon demurrer after able and elaborate argument. If that bill could not be sustained, certainly this cannot be, unless it be, as maintained on the complainant's behalf, that this contract gives an interest in the realty by allowing the use of the depot and tracks. It is clear that the contract gives no such interest. Complainant under it has no possession of the depot or control of the tracks."

The court therefore held that the injunction should be dissolved.

In Baldwin vs. Kansas City M. & D. R. R. Co., by the Supreme Court of Alabama, reported in 20th Southern Rep. page 349, the headnote is as follows:

"A railroad company contracted to put in a switch and sidetrack at a sand pit owned by the plaintiff, and to haul sand from such pit for $8.00 per carload. The switch and sidetrack were put in as agreed and

sand was hauled under the agreement for three years, when the company notified plaintiff that from a certain date the rate of freight would be increased to $12. per car. Held, that the contract being uncertain as to time, was determinable at the election of either party and an action would not lie for damages for the breach."

AUGUSTA CANAL A QUASI PUBLIC SERVICE COMPANY.

In the case of Millers v. City Council of Augusta, 63 Ga. 772, the Supreme Court of Georgia held that the City, in owning and operating the Canal, was a quasi public service company, and likened it to the keeper of an inn, a keeper of a toll bridge or ferry, a common carrier, and a keeper of a custom mill, and that it must supply its customers owning plants along the Canal, and furnish each establishment a sufficiency of water, if to do so be reasonably within its power, and if the customer is willing to pay and offers to pay at the usual rate, and that this duty in the case of the Augusta Canal holds good whether there is any express contract between the parties or not.

The Millers owned a grist mill located on a lot adjoining the second level of the Augusta Canal and the City had constructed a waste-way near their mill from the first to the second level of the Canal, thereby greatly diminishing and decreasing the waterpower at their mill. When the Millers complained to the City, they were notified by the City that they had no contract with the City for the use of water from the Canal, in writing, and, as the verbal agreement for the use of the water was not binding, unless the complainants would forego their grievance and apply for a new contract for use of water under the changed status of said head and flow, the City would cut off said water entirely from said mill. Suit was brought for an injunction to restrain such action on the part of the City Council and the trial court granted a non-suit. The Supreme

Court of Georgia in reversing this decision recited the Acts of the Legislature authorizing the original construction of the Canal and its transfer to the City, holding the relation between the City as the owner of the Canal, and the users of water power therefrom who had built their plants on the banks of the Canal on the invitation of the City, as that of a quasi public service company, as stated above.

On page 781, the court used this language:

> "Again it is essential that all reasonable expectations of a continuous and regular supply of water, **on payment of the established water rents or rates of compensation,** should be met, and none disappointed. Each mill or factory is dependent for profitable working upon drawing from the Canal as much water as it needs, and when it needs it. The City keeps a water market, so to speak, and the patrons of the Canal have repaired to that market and at great expense put themselves in a situation to use the water."

On page 782, after holding that the City is the owner of the Canal as a quasi public company, and likening it to the keeper of an inn, keeper of a toll bridge, common carrier, etc. the court continues af follows:

> "So we think the owner of a canal constructed in part for manufacturing purposes and afterwards held out as a source of water-supply, must, after expensive machinery has been set up along its banks on the faith of obtaining the needed supply, furnish it and every establishment a sufficiency of water, if to do so be reasonably in its power and **if the customer is willing to pay and offers to pay at the usual rate.** This duty in the case of the Augusta Canal holds good whether there is any express contract between the parties or not. Doubtless under the terms of the charter, those patrons who make express contracts and renew them from time to

time, would have a preference, so that if any have to be disappointed for want of means to serve all, the non-contracting patrons would be the sole sufferers."

On page 783 the Court quotes from the original Act of 1845 the language authorizing the Board of Managers for the time being to impose and collect such tolls, rents and other charges as they may deem equitable or expedient, and which do not interfere with any of the existing contracts or obligations of said company. But the court held that it did not think that the clauses in the original charter were intended to enable the company to force its patrons into express contracts and to measure its duty to furnish water solely and exclusively by agreements of that character, holding that such a construction would render it optional with the company to furnish for a time and then cease, or to supply one and not another, though having means to supply all, stating that there was no provision in the charter for pledging the company or the managers to contract with anybody, or to renew expired contracts.

Further analogizing the powers and duties of the Canal Commission to other quasi-public service corporations or persons, the court used this language:

"If a statute were passed giving inn-keepers, toll-bridge keepers, ferrymen, common carriers and millers the power to establish their own rates and to make all contracts in their business, it surely would not follow that they could turn away customers who offered to pay cash at **regular rates,** merely because no previous express contract had been entered into. No doubt the Canal Co., acting in good faith, could lawfully engage all of its available water to those of its customers first applying and first stipulating by express contract to take it and pay for it; just as an inn may be filled with the first arrivals and remain full as long as these choose to stay. But this is quite a different matter from

refusing capriciously and without just cause, to furnish water that customers need and apply for and which is pre-engaged to none."

We respectfully insist that this construction by the Supreme Court of Georgia, of the relations between the City Council of Augusta in operating its canal, and the manufacturing plants who are its customers, fully recognizes the right on the part of City Council of Augusta as the owner of the Canal, from time to time to fix the rates and charges which it will exact for the use of the water power from the Canal, and that it is required to furnish such water power only to those customers who will take the water and pay for the same at the prevailing rates and charges.

The doctrine of vested rights which the plaintiff in this case is insisting upon to the use of water from the Canal, based upon its large outlay of expenditures in the construction and equipment of its plant, extends only to the right of all customers and water-users from the Canal to obtain the water power under the same rules and regulations as all other customers and only and on condition that it will pay therefor the prevailing rates charged by the City Council of Augusta to all of its customers for such power, and the decision negatives the idea that the plaintiff has any vested right in perpetuity to the rate which prevailed at the time its mill was first constructed.

This case also recognizes the right of the City to enter into express contracts for the use of this power with its customers and the priority and right of such customers who enter into contracts, over those who do not.

CASES RELIED UPON BY PLAINTIFF

The plaintiff cites in support of its contention in this case, 13th Corpus Juris p. 604, and the following cases cited in support thereof:

In McKell vs. Chesapeake R. R. Co., 175 Fed. 321, there was an express agreement on the part of the Railroad Company that if the owner of coal lands would furnish the right-of-way and would agree to put in a coal plant of not less than 1,000 tons of coal per day, and coke ovens that would use one-third of the same, and would furnish coal at the same price as the Pocahontas people do, that the railroad would build the branch line through the coal lands and would then agree to take from them at this price whatever amount of coal they agreed to furnish,—not less than 100,000 tons a year; or if they prefer to ship it themselves, the railroad would give them the lowest rate made to any parties.

This was accepted by the owner of the coal lands; the agreement was carried out and put into operation, and after a few years the railroad company undertook to terminate the arrangement and the Circuit Court of Appeals for the 6th Circuit held that it was an executed contract and could not be terminated at will by either party without the consent of the other.

Note from the body of the decision that the correspondence between the parties made an express contract.

The next case cited is that of Western Union Telegraph Co. vs. Pa. R. R. Co., 129 Fed. 849. This was a contract made between the predecessors in title of the Pa. R. R. Co. and the Western Union Telegraph Co. in 1856, for the joint construction, use, maintenance and operation of telegraph poles and lines, and a telegraph system on the right-of-way of the Railroad track between Cleveland and Pittsburg. After the contract had been made, and operation under it had been in effect for nearly 50 years, the railroad company undertook to terminate it by notice. The District Court held that it could be terminated by the railroad company, and the decision of the District Court is reported in 125 Fed. pp. 67 and 72. But this decision of the

District Court was reversed by the Circuit Court of Appeals for the Third Circuit, and after stating the terms of the contract, as stated above, the court held as follows:

> "That the relations created between the parties by the contract were not merely personal, as in cases of partnership, master and servant, and the like, but the rights of property and the user thereof, in the nature of an easement, were conferred on the Telegraph Company, and that, in the absence of any express provision thereof, no right in the railroad company to determine or revoke the same at will, could be inferred from the silence of the contract in that respect, or from its terms, purpose, or inherent nature."

The court, in its decision on page 806, cites the case of Franklin Telegraph Co. vs. Harrison, reported in 145 U. S. 459.

In the Harrison case the Telegraph Company had given Harrison the right to put up at his own expense, and maintain and use, a wire upon the poles of the company between New York and Philadelphia, the company to have the use of the wire when not so employed. The company agreed to keep and maintain the wire and bear all expenses connected with its working, and to permit such use by Harrison for a period of ten years. At the end of that time the wire was to be the property of the company, the company agreeing to lease the same to Harrison for his own use for the sum of $60 per annum, payable quarterly, and upon the same terms, in all other respects, as if the wire had not been given up to the Company. The wire was put up by Harrison and used by him for a term of ten years without compensation, and after that, at the agreed compensation. The company then notified Harrison that the use of the wire by him had become such as to exclude the company from all use of it, which was not contemplated by the original contract, and that the

agreement would be terminated by the company. A bill was filed by Harrison to restrain the company from so doing. It had been contended in the Circuit Court, as it was contended in the Supreme Court, that the agreement to lease the line at the expiration of ten years to Harrison for a yearly rental of $600, was revocable because no term being mentioned, the use of the word "lease" imported a contract revocable from year to year. The Circuit Court of Appeals held that Harrison was entitled to an irrevocable license, subject to the payment of $600 per annum, payable quarterly, and this decree was affirmed by the Supreme Court in 145 U. S. p. 459.

Here there was an expres contract, but in the case on trial there was admittedly no express contract between the John P. King Mfg. Co., and the City Council of Augusta, and the plaintiffs are relying upon what they claim is an implied contract.

In the Harrison case the Supreme Court distinguished that case from the Marshall case in 136 U. S. 393.

In the two above cited telegraph cases, not only were the agreements evidenced by an express contract, which differs from this case, but the parties claiming the rights under the express contracts actualiy contributed to, or paid the expense of constructing the utility, and thereby acquired an interest and easement in the utility involved. In this case the John P. King Mfg. Co. had no part whatever in constructing the Canal, nor in maintaining it, nor acquired any easement or right therein, except that by building its mill near the banks of the Canal and preparing to use the water therefrom, it made itself a customer, just as any manufacturing plant who builds along the line of a railroad, makes itself a customer, and the only extent of any vested right, is such as is described in the Millers case from the Supreme Court of Georgia, cited above, and that is that it shall not be discriminated against nor capricious-

ly denied the use of waterpower from the Canal as long as it is willing to pay the prevailing rates.

LAW OF LICENSE NOT APPLICABLE

Learned counsel for plaintiff, in their efforts to supply a plausible ground to sustain their position, for the lack of an express contract to furnish the power at a fixed price in perpetuity,invoked the law of license, and cite and quote a number of license cases.

These cases would be interesting if pertinent or applicable to the question here involved, but unfortunately for the plaintiff's position, this is not a case of a license to use another's property, but is the sale of a commodity, namely: water power.

If the decision of the Supreme Court in the Millers case, reported in 63 Ga. did not decide all of the other questions, as we contend it did, it certainly made clear the proposition that the City Council, as the owner and operator of the Augusta Canal, was in the class of those quasi public service corporations organized for the purpose of supplying the public, and in the further discussion classed it with "inn keepers", "toll bridge keepers", "ferryman", "common carriers" and "millers."

What would learned counsel for plaintiff say if the doctrine of license was invoked in favor of the owner of a manufacturing plant located on the line of one of the great railroad corporations which they represent, against the change, modification or increase of railroad rates We apprehend that they would call such a contention or claim absurd or ridiculous.

In like manner, how would the keeper of a hotel, or toll bridge, or a ferryman or a grist mill, reply to one of its customers who protested against the change of rates or charges, upon the ground that being a regular patron of such institution, he had a license to maintain the rates or charges which were in existence when he first became a patron?

Nor does the fact that the plaintiff in this case expended money in building its plant near the banks of the canal so as to draw water from the canal, change the proposition. In like manner has the manufacturing corporation expended large sums of money in building its plant on the line of the railroad company or common carrier.

Usually in the cases of licenses which are held to be irrevocable, or to amount to an easement, the facts show that the licensee has gone upon the lands of the licensor with his permission, and expended his money and means and produced his own commodity. The most usual pertinent illustration of this class of licenses arises from the construction of a dam to operate some manufacturing plant by backing water on the lands of another. The principle seems to be that where the licensor consents or grants the license to flood his lands, he does so from some expected benefits to himself by the construction of the dam, but all of the expenditure is by the licensee. All of the labor and cost of producing the product is by licensee. The theory is that when the owner has consented for this use of his land, and thereby induced the licensee to expend large sums of money in the construction, it would be inequitable and unjust to cause the licensee to lose his investment. But there is nothing of that character in this case. The plaintiff still owns its mill, with all of its machinery and equipment, and it still has the right to obtain power from the Canal upon the same terms as all other users. So far as the water power of the Canal is concerned, the plaintiff expended not a single dollar in the construction of the Canal, nor has it ever expended a dollor in its upkeep. The Canal belongs to the City of Augusta, who built it and paid for it, and is the owner of it and is operating it to furnish power to its patrons whose plants are located along the canal. But the complete answer to all of the arguments of plaintiffs, based upon the license cases, is the statement made by Chief Justice Bleckley in the Millers case in 63 Ga.,

that the City Council of Augusta in owning and operating the Canal, is a quasi public service corporation selling power to its customers, and not a licenser.

In the case of Augusta & Savannah R. R. Co. vs. Augusta Southern R. R. Co., 96 Ga. on page 562, the Supreme Court of Georgia defined a license as follows:

> "A license, as a term of real estate law, is defined to be an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein."

UNILATERAL CONTRACT

Another potent reason why the plaintiff did not set up or establish the existence of a valid legal contract in this case is that the facts alleged show no consideration.

Civil Code Sec. 4241 of the Georgia Code of 1910 is as follows:

> "A consideration is essential to a contract which the law will enforce. An executory contract without such consideration is called nudum pactum, or a naked promise."

Where mutual promises are relied upon to furnish the consideration Civil Code Sec. 4246 is applicable and is as follows:

> "A promise of another is a good consideration for a promise."

But in the case of Buick Motor Co. v. Thompson, 138 Ga. 282, the 1st headnote is as follows:

> "If mutual promises are relied on as a consideration to support a contract, the obligations of the contract must be mutually binding upon the respective parties."

It is very clear in this case that there has never been any promise or obligation on the part of the plaintiff to accept, take use or pay for water from the Augusta

Canal at $5.50 per H. P. in perpetuity, and therefore we contend that the alleged contract as to the rate and time for which it was to apply becomes what is called a unilateral contract and cannot be enforced against the City.

In Doebler vs. Waters, 30 Ga. 347, the Supreme Court of Georgia held as follows:

> "A contract without consideration will not be enforced and so any part which can be separated from the rest and shown to be without consideration, will not be enforced."

But the most pertinent decision which we have been able to find as applicable to the facts of this case, is by the Supreme Court of Georgia, in the case of Morrow vs. Southern Express Co., 101 Ga. 810, where the headnote is as follows:

> "Where mutual promises are relied upon as a consideration to support a contract, the obligations of the contract must be mutually binding upon the respective parties; and if one assume under such an agreement to do a special act beneficial to another and that other, under the terms of the contract, is under no obligation to perform any act of corresponding advantage to the former, the agreement is without such consideration as will support the promise of the party assuming to perform; **especially is this so when the time during which the alleged contract is to remain operative is so indefinite and uncertain as to render the same incapable of enforcement.**"

This was a case where the plaintiff, Morrow, brought suit against the Southern Express Company for the breach of an alleged contract originally made by Morrow with the Central R. R. Co. for as long as he desired, to receive and carry all of the milk and butter which he would offer for shipment at and from a given point to Atlanta, and return the vessels to the receiving

point at a given rate per thirty gallons. The shipments under this contract continued until 1882, when the Express Company declined it any further. The contract was held not to be mutual because Morrow did not bind himself for any definite period of time, nor in perpetuity, to ship the milk.

On page 811 the court used this language:

"If the contract was valid and binding, an action would lie for a breach thereof. If, on the other hand, the contract was not valid and binding, there can be no recovery. It is axiomatic in the law of contracts that there must be a consideration moving the parties thereto. The law will enforce no contract which is without consideration. An executory contract, without consideration, is nudum pactum and without binding force." Citing the Georgia Civil Code, Sec. 4241 quoted above."

The Court continued:

"Among the considerations recognized by law as sufficient to support a contract, is that of mutual promises or, as it is sometimes termed, a promise for a promise.'"

"By Section 3661 (now 4246) of our Civil Code, it is declared that the promise of another is a good consideration for a promise. A promise however is not a good consideration for a promise unless there is an absolute mutuality of engagement so that each party has the right at once to hold the other to a positive agreement. Citing Parsons on Contracts, par. 449, and among other cases that of Dorsey vs. Parkwood, 53 U. S. 126, and also the famous case of Burton vs. Great Northern Ry. Co., 9th Exchequer 507."

The court continues as follows:

"And in cases of mutual promises, where the promise of one party is relied on as a consideration by

the other, the promises must be concurrent and obligatory upon each at the same time in order to render either binding. Citing 18 Barb. (N. Y.) 317; 21 Windell 134; 4 John 235; Clark on Contracts p 166; Story on Contracts par. 569; 40 N. J. Equity 422."

In the case of Dorsey vs. Packwood, 53 U. S. p. 126, the first syllabus is as follows:

"An agreement whereby the purchaser of a plantation bound himself to transfer to his son-in-law one-half of the plantation, slaves, cattle and stock, as soon as the son-in-law should pay for one-half of the cost of said property, either with his own private means or with one-half of the profits of the plantation, was deficient in mutality. The son-in-law was not bound to render any services, nor pay and money. It was a nude pact."

In McCaw Mfg. Co. vs. Felder, 115 Ga. 411, the Court held as follows:

"If the alleged contract set forth in defendant's plea was unilateral and wanting in mutality, then of course the items of damage set forth in the plea constituted no proper matter of set-off against the plaintiff's demand."

At the bottom of the same page (411) the court used this language:

"While a promise is a good consideration for a promise, the promise in each instance must be of such a character as to be capable of enforcement against the party making it, as otherwise neither party will be bound. It must be sufficiently definite, both as to time and subject matter. The promise itself, taken in the light of the circumstances, must contain sufficient data to enable it to be enforced. These principles would seem to be almost axiomatic, but great difficulty has been experienced in applying them to particular cases."

In Harrison vs. Wilson Lumber Co., 119 Ga. 6, the 3rd headnote is as follows:

> "A contract by which one of the parties undertakes to saw at a given price and in a specified manner, all of the timber which the other party shall furnish during a stated period, but which does not bind the other party to furnish any timber, is unilateral and cannot be made the foundation of a suit by the party promising to do the sawing, for damages against the other party for his failure to furnish timber to be sawed."

In Swindell & Co. vs. First National Bank, 121 Ga. 714, the first headnote is as follows:

> "A contract between a bank and a lumber manufacturer whereby the Bank agreed to advance to him a certain sum of money, but the manufacturer was not bound to take the whole or any part of said sum unless he found it necessary in conducting his business, was unilateral in that there was no binding obligation on the part of the manufacturer to borrow any definite sum of money."

In Cooley vs. Moss, 123 Ga. 707, the 3rd headnote is as follows:

> "Where mutual promises are relied on as a consideration to support a contract, the obligation of the contract must be mutually binding upon the respective parties. If one assumes under such an agreement to do a special act beneficial to another, and that other, under the terms of the contract, is under no obligation to perform any act of advantage to the former, the agreement is without such consideration as will support the promise of the party assuming to perform."

The Judge of the Superior Court in his very able, clear and detailed decision in this case refusing the Injunction prayed for and sustaining the demurrer to

the plaintiff's petition, very aptly and with great force established the unilateral character of the alleged contract in dealing with the letters of Estes and Verdery, the promoters, attached as Exhibits to the plaintiff's petition, in which it was claimed by them that they had a proposition from the City to furnish water at the rate of $5.50 per H. P. in perpetuity. The court, in dealing with these two letters, uses this language (P. R. 69):

> "If there was a proposition from the City to furnish water to the John P. King Mfg. Co. in perpetuity at the rate of $5.50 per H. P., there is nothing in the evidence which shows that the proposition was ever accepted by the John P. King Mfg. Co. for such duration and rate; neither is there any evidence tending to show that the John P. King Mfg. Co. ever intended to accept the water at such a rate for such length of time. So that assuming that the City Council of Augusta made such a proposition to the John P. King Mfg. Co., there is no evidence tending to show, nor is it contended by the plaintiff, that the John P. King Mfg. Co. entered into such an agreement to take and pay for the water in perpetuity."

> "Therefore, if such proposition was made by the City Council of Augusta to the John P. King Mfg. Co. to furnish a given amount of water at $5.50 per H. P. in perpetuity, and there was no agreement on the part of the John P. King Mfg. Co. to accept and pay for such amount of water at such rate in perpetuity, it would be a unilateral contract, and unenforceable."

The court continuing (P. R. 70) used this forceful language:

> Suppose the John P. King Mfg. Co. tomorrow were to decide that it would use no more water from the City Canal, but would operate its mill by electricity; is there any evidence in this case, when most

elaborately construed, by which the City Council of Augusta could compel the John P. King Mfg. Co. to take and pay for its water at $5.50 per H. P. in perpetuity There is neither a line nor an intimation of such evidence. If that be true, the City Council of Augusta could not be compelled to furnish to the John P. King Mfg. Co. water at $5.50 per H. P. forever."

Other cases holding that the absence of mutuality of obligations in executory contracts renders the same invalid, are taken from the decisions by the U. S. Courts, as follows:

In Wilcox & Gibbes Sewing Machine Co. v. Ewing, 141 U. S. 627, the 1st syllabus is as follows:

"A contract of agency which leaves the agent free to terminate his relations with the principal upon reasonable notice, must be construed to confer the same right upon the principal, unless provisions to the contrary are stipulated."

In the case of A Santaella & Co. vs. Otto F. Lange Co., 155 Fed. 719, the Circuit Court of Appeals held as follows:

"There is want of mutuality necessary for a valid contract where plaintiff, the manufacturer of a certain cigar, offered to sell in the future to the defendant, a cigar dealer, as many of such brand as he might desire for his wants, and to continue to do so during the life of the brand, as long as the defendant cared to sell them."

In the case of T. B. Walker Mfg. Co. vs. Swift & Co., 200 Fed. Rep. 529, the Circuit Court of Appeals held that a contract to sell such quantities of a commodity as the buyer may choose to order, the buyer not agreeing to order any quantity, is void for want of mutuality.

In Hazlehurst Lumber Co. vs. Mercantile Lumber & Supply Co., 166 Fed. 191, the court held as follows:

"A contract by which defendant agreed to purchase all ties complainant could produce until a specified date, at a certain price, complainant agreeing to deliver to defendant all ties that it could produce up to that date, was unenforceable for want of mutuality, the complainant being under no enforceable duty to deliver any ties."

It seem unnecessary to cite other authorities supporting the proposition so well established and recognized by all the courts in this country.

PUBLIC SERVICE CORPORATIONS CANNOT DISCRIMINATE AS TO RATES.

If the plaintiff establishes its contention in this case that under the facts as stated in its petition it is entitled to a rate for water power of $5.50 per H. P. in perpetuity, then either the City Council of Augusta must charge all of its customers $5.50 per H. P. in perpetuity, and as a result be held for all times to this losing rate, which will amount to practical confiscation of its property under present changed conditions; or, it must discriminate against all of its other customers who, under the Ordinance of August 20th, 1924, are now paying $11.00 per H. P. for day use of the water from the Canal. This would be contrary to the policy of the law which is set forth, as far as railroads are concerned, in Article 4, Section 2, Paragraph 1 of the Constitution of the State, which prohibits railroads from discriminating between its customers, and which also requires that their rates shall be just and reasonable. While the Legislature of the State in 1879 undertook to carry out this provision of the Constitution by creating the State Railway Commission, and later changed its name to Public Service Commission, and from time to time has added various public service corporations to the class of utilities to be regulated and controlled by said Commission, waterpower companies furnishing raw water power have not been placed under the Railroad Commission and under the organic Act creating

the Augusta Canal Company, its managers still have the power to fix rates. But these rates must be just and reasonable and must be without discrimination, since this company is held to be a quasi pubic service company.

The principle of law prohibiting discrimination by public service corporations is clearly stated in the case of N. C. Public Service Co. v. Southern Power Co., 282 Federal 837, as follows:

> "But when a corporation has definitely undertaken and entered upon a particular service authorized by a charter, which confers the right of Eminent Domain, the obligation to perform the service is complete, its rates and terms are subject to regulation by the public authority, and it must serve all alike. Such public service cannot pick and choose its customers."

The same principle is stated in the case of State vs. Bell Telephone Co., 23 Fed. Rep. 539, and is applied to a municipality equally with privately owned public utilities when the municipality is engaged in operating a public utility.

See also to the same effect the case of Postal Cable Tel. Co. vs. Cumberland Tel. Co., 177 Fed. 726.

RATES MUST BE REASONABLE.

In Pond on Public Utilities, 3rd. Ed. 557, dealing with the reasonableness of rates where the public utility company fixes its own rates and charges, it is stated that the rates must be reasonable with reference to the value of the service to the customer, and on page 558 in the same paragraph it is stated that changed conditions justify a change of rates, and cites in support of this proposition the case of the City of Scranton vs. Public Service Co., 268 Pa. 192. And in par. 559 of the same Volume, it is stated that the reasonable value of the service determines the rate.

Attention is called to the fact that the plaintiff in its petition does not attack the reasonableness of the rate of $11.00 per H. P. for day use of water from the Canal as fixed by the Ordinance of August 20th, 1924, and as the reasonableness of the new rate of $11.00 per H. P. for day use was expressly alleged and set forth in the defendant's answer in paragraphs 31 and 32 (P. R. 65) it should be presumed that the new rates are reasonable.

Force is added to this presumption by the plaintiff's reservation in the 30th paragraph of its petition (P. R. 34) preserving its right to execute its contract for the 1244.3 H. P. in question under the terms of the Ordinance of August 20th, 1924, in the event it fails to establish its contract in perpetuity in this litigation.

CAN A MUNICIPALITY MAKE CONTRACT IN PERPETUITY?

While the answer to this question is not essential in the decision of the present case, there is very considerable authority to the effect that a municipal corporation cannot make a contract in perpetuity which affects its revenue, even in connection with the municipality's operation of a quasi public service utility. This question has been expressly decided by the Georgia Supreme Court in the case of Horkan vs. Moultrie, 136 Ga. 561, where the 1st headnote is as follows:

> "1. A council of a municipality cannot make a binding contract by which it undertakes to obligate the municipality to furnish 'free of charge' for an indefinite time in the future, sufficient water for the closets in a given building, situated within the corporate limits, in consideration of the owner of the building allowing the municipality to lay its sewer through his land."

In the body of the decision on page 562 the court uses this language:

"We have found no case, however, that would tend to support a contract made by a city council in behalf of a municipality to furnish water indefinitety to one of its citizens in consideration of his permitting it to lay a sewer through his land. Succeeding councils would necessarily have the power, we think, to change the water rates from time to time, as circumstances might require or justify, in order to obtain sufficient revenue to maintain its water works system on the one hand, and on the other, in order to serve all of its patrons at reasonable rates and on equal terms. To allow one council to legally bind the city by a contract of the kind herein given, might so tie the hands of its successors as to result in great injury to the municipality and to the public."

The court then cites the case of Trustees vs. City of Jacksonville, 61 Ill. App. 199, as follows:

"Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." Citing 1st Dillon's Municipal Corporations, 4th Ed. par 97.

The court then cites the Georgia Civil Code of 1910, Sec. 892, under an Article headed "Limitation on Powers of City and its Officers", which is as follows:

"One council cannot, by an ordinance, bind itself or its successors so as to prevent free legislation in matters of municipal goernment."

The decision also cites the case of Tarver v. Mayor of Dalton, 134 Ga. 462, where a contract between the

City Council of Dalton and the Dalton Mills, in consideration of the mills furnishing a certain water supply to the City, limited the amount which could be collected in taxes from the mills, and in that case the court held such a contract was not legal.

It is true that in the Moultrie case cited above, the court was dealing with a municipality owning and operating a water works system for the use and benefit of its citizens generally, and in the present case before the court, the municipality was owning and operating a water works system for supplying water power to its customers. While the function in each case was the operation of a public utility, from which the municipality derived a revenue, there may be this difference in the two cases: That it would be inexpedient to operate a canal for the purpose of producing water power and selling the same to manufacturing plants for a period limited to the existing term of a city council; and perhaps for that very reason the Act of the Georgia Legislature in 1845 incorporating the Augusta Canal Company, expressly authorized the Canal Commissioners to make contracts, and this right was expressly recognized by the Georgia Supreme Court in the Millers Mill case cited above from 63 Ga. 772.

The very nature of the utility which the City was operating in a measure required it to have this power. In fact in the Moultrie case cited above, on page 562, the court stated this proposition:

> "The weight of authority sustains the doctrine that a municipal corporation may make a valid contract, to continue for a reasonable time beyond the official term of the officers entering into the contract for the municipality. Citing 3rd Abbott's Municipal Corporations, par. 904."

In fact the City of Augusa itself has recognized this principle, because the Ordinance of March 7th, 1886 (P. R. 20) expressly fixed the period for 20 years from

that date for the rate of rental of water power from the Canal, and in like manner Sec. 252 of the City Code (P. R. 22) fixed the rate for water power at $5.50 for a period of 20 years from March 7th, 1906. And even the present Ordinance, which is attacked in this case, of August 20th, 1924 (P. R. 51-52) fixes the period, at the present rate of $11.00 per H. P. for day use, for 10 years from March 7th, 1926.

But this is quite a different proposition from the City entering into a contract at any fixed rate in perpetuity, which would be practically a disposition of its property rights in a revenue producing quasi public utility, and it is exceedingly doubtful whether a municipality, without express legislative authority, has this power.

HAS THIS COURT JURISDICTION TO REVIEW IN THIS CASE?

We have not discussed this question nor cited any authorities in reference thereto, for the reason that this court, in the case of Appleby v. The City of New York, 271 U. S. p. 364, apparently settled this question. In that case the first headnote is as follows:

> "1. Upon review of a decision of a State court enforcing a State law over the objection that it impairs the obligation of a prior contract, this court must decide whether there was a contract, what was its proper construction and effect, and whether its obligation was impaired."

> "2. And although the construction and effect of the contract involved, depend on questions of State law, this court must determine those questions independently of the conclusion of the State court."

This seems to settle the question of jurisdiction in this case, and while the State trial court held that there was no contract, and this decision was affirmed by the Georgia Supreme Court holding that there was no con-

tract, that question will have to be considered and determined by this Court, namely: whether plaintiff had the contract which it claims in this case.

Respectfully submitted,

E. H. CALLAWAY and CALLAWAY & HOWARD, Special Counsel.

and

ARCHIBALD BLACKSHEAR, City Attorney, Counsel for City Council of Augusta and R. H. Daniel, Mayor, Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

No. 392.—October Term, 1927.

John P. King Manufacturing Company, Plaintiff in Error, vs. City Council of Augusta et al.	In Error to the Supreme Court of the State of Georgia.

[May 14, 1928.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit brought in a state court in Georgia to restrain the enforcement of an ordinance of the City of Augusta fixing rates for water power supplied from a canal owned and maintained by the city. The plaintiff is a manufacturing company which operates a mill adjacent to the canal with water power supplied therefrom. The objection urged against the ordinance is that it is repugnant to the contract clause of the Constitution of the United States, and therefore invalid, in that it impairs the obligation of a prior contract whereby the city undertook to supply water power for the plaintiff's mill in perpetuity at a lower rate than that fixed in the ordinance. The court of first instance held the ordinance valid and accordingly dismissed the suit. This was affirmed by the Supreme Court of the State, — Ga. —; and the case is here on writ of error allowed by the Chief Justice of that court.

Counsel on both sides treat the case as one which rightly may be brought to this Court on writ of error, but some members of the Court doubt that it is such a case. Therefore this question will be given immediate consideration.

The jurisdiction of this Court to review on writ of error judgments or decrees of state courts of last resort is defined by § 237 (a) of the Judicial Code, as set forth in the amendatory act of February 13, 1925, c. 229, 43 Stat. 936. As there defined this jurisdiction extends to two classes of cases—

(1) "where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity;"

(2) "where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution,

treaties or laws of the United States, and the decision is in favor of its validity."

Plainly the present case is not within the first provision. Is it within the second? This depends on the sense in which the words "a statute of any State" are used therein. If they are used as narrowly comprehending only an enactment of the state legislature, the case is excluded; but if they are used as broadly comprehending any legislation proceeding from the law-making agencies of the State, the case is included.

In usage "statute" is a term which has both a restricted and a broad signification. This is reflected in the following excerpt from Bouvier's Law Dictionary, Rawle's Revision:

"STATUTE. A law established by the act of the legislative power. An act of the legislature. The written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state.

"This word is used to designate the written law in contradistinction to the unwritten law.

"Among the civilians, the term statute is generally applied to laws and regulations of every sort; every provision of law which ordains, permits or prohibits anything is designated a statute, without considering from what source it arises."

The Constitution of the United States does not use the term "statute", but it does employ the term "law," often regarded as an equivalent, to describe an exertion of legislative power. Thus it is declared that a bill presented in either house of Congress, if receiving prescribed favorable consideration, shall "become a law", Art. I, § 7; that Congress may "make all laws" necessary and proper for carrying into execution various enumerated powers, Art. I, § 8, cl. 18; that no State "shall pass" any "*ex post facto* law or law impairing the obligation of contracts", Art. I, § 10, cl. 1; that no State "shall make or enforce any law" abridging the privileges or immunities of citizens of the United States, Fourteenth Amendment, § 1; that the Constitution, "laws" and treaties of the United States shall be the supreme law of the land and the judges in every State shall be bound thereby, anything in the Constitution or "laws" of any State to the contrary notwithstanding, Art. 6, cl. 2, and that the judicial power of the United States shall extend, among others, to all cases in law and equity arising under the Constitution, "laws" and treaties of the United States, Art. 3, § 2.

It of course rests with each State to determine in what form and by what agencies its legislative power may be exerted. It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide law-making functions and may delegate legislative authority to subordinate agencies, such as municipal councils and state commissions. But whether this power be exerted in one form or another, or by one agency or another, the enactments put forth, whether called constitutional provisions, laws, ordinances or orders, are in essence legislative acts of the State; they express its will and have no force otherwise. As respects their validity under the Constitution of the United States all are on the same plane. If they contravene the restraints which that instrument places on the legislative power of a State they are invalid, no matter what their form or by what agency put forth; for, as this Court has said, the protection which these restraints afford applies, "whatever the form in which the legislative power is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission". *Standard Scale Company* v. *Farrell*, 249 U. S. 571, 577.

The jurisdictional provision we are considering is designed to be in aid of such protection. It proceeds on the theory that through inadvertence or design those who are entrusted with the legislative power of a State may exercise the same in a manner forbidden by the Constitution of the United States, and that the state courts may uphold such legislation when it should be held invalid. Unlike other state action, legislation consists of rules having continuing force and intended to be observed and applied in the future; and this regardless of the state agency from which it proceeds.

Were the question an open one, these considerations would afford impelling reasons for holding that the jurisdictional provision uses the words "a statute of any State" in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the State gives its sanction. But the question is not an open one; it heretofore has been resolved in keeping with the view just indicated.

The jurisdictional provision originally was part of § 25 of the act of September 24, 1789, c. 20, 1 Stat. 73, 85, which authorized this Court to review on writ of error judgments and decrees of state courts of last resort in cases—

(1) "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity;"

(2) "where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity;"

(3) "where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or commission specially set up or claimed by either party under such clause of said Constitution, treaty, statute or commission."

By the act of February 5, 1867, c. 28, 14 Stat. 385, that section was reenacted—the first and second provisions without change and the third to read as follows:

(3) "where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority".

The three provisions—the third as so amended—were carried into § 709 of the Revised Statutes of 1873 and into § 237 of the Judicial Code of 1911. By the act of September 6, 1916, c. 448, 39 Stat. 726, the third provision was eliminated so far as a review on writ of error is concerned; and by the act of February 13, 1925, *supra*, the first and second provisions were amended by omitting from both the words "or an authority exercised under" and with that change were reenacted in § 237 (a).

In order that the second provision—the material one in this case—and the change made therein may be accurately in mind we now quote the provision in both its original and its amended form—

[Act 1789] "where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity"

[Act 1925] "Where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity"

It will be seen that the phrase "a statute of any State" has been in the provision from the time of its original enactment, and that this phrase was retained in the reenactment of 1925 without change or qualification. So, its meaning before the reenacment is its meaning now.

Before coming to decided cases which we deem relevant it is well to refer to some which, although cited as in point, appear to us not to be so. *Weston* v. *Charleston*, 2 Pet. 449 and *Home Insurance Company* v. *Augusta*, 93 U. S. 116, are examples. The first is a case where a tax ordinance of Charleston was sustained by the state court over the objection that it was in conflict with the Constitution of the United States. This Court's jurisdiction was invoked, and was by it sustained, p. 463, on the ground that the city's action in adopting the ordinance was the "exercise of an authority" under the State. Whether the ordinance was a statute of the State was not considered. The other case also involved a municipal ordinance which the state court had upheld against the contention that it was in conflict with the contract clause of the Constitution. This Court took jurisdiction, p. 121, on the grounds (a) that the validity of an authority exercised under the State was in question and (b) that a right claimed under the Constitution was denied. There was no negation of other grounds.

Williams v. *Bruffy*, 96 U. S. 176, is the first case in which the phrase "a statute of any State" in the jurisdictional provision was considered and construed. There a debt arising on contract and owing by a citizen of Virginia to citizens of Pennsylvania had been sequestrated during the Civil War under an enactment of the Confederate States and collected from the debtor by that government. After the war the creditors brought a suit against the debtor's administrator in a state court in Virginia to collect the debt. The defendant interposed pleas setting up the sequestration and collection under the confederate enactment. Judgment went for the defendant on these pleas over the plaintiffs' objection that the confederate enactment was invalid under the Constitution; and the Supreme Court of Appeals sustained that ruling. The case was brought to this Court on writ of error.

its jurisdiction being invoked on the grounds that the case was one (a) where the validity of both a statute of the State and an authority under the State was drawn in question as repugnant to the Constitution and was sustained, and (b) where a right, privilege and immunity claimed under the Constitution was denied. The jurisdiction was contested, but was sustained expressly on "both" grounds in a considered opinion by Mr. Justice Field, speaking for the entire Court. In sustaining the first ground he said pp. 182-183:

"The pleas aver that a confederation was formed by Virginia and other States, called the Confederate States of America, and that under a law of this confederation, enforced in Virginia, the debt due to the plaintiffs was sequestrated. Now, the Constitution of the United States prohibits any treaty, alliance, or confederation by one State with another. *The organization whose enactment is pleaded cannot, therefore, be regarded in this Court as having any legal existence. It follows that whatever efficacy the enactment possessed in Virginia must be attributed to the sanction given to it by that State.* Any enactment from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this Court. It would be a narrow construction to limit the term to such enactments as have gone through various stages of consideration by the legislature. There may be many acts authorized by the constitution of a State, or by the convention that framed it, which have not been submitted to the consideration of its legislature, yet have all the efficacy of laws. By the only authority which can be recognized as having any legal existence, that is, the State of Virginia, this act of the unauthorized confederation was enforced as a law of the Commonwealth. Its validity was drawn in question on the ground that it was repugnant to the Constitution of the United States, and the decision of the court below was in favor of its validity."

Ford v. *Surget*, 97 U. S. 594, is much like the case just cited. The plaintiff sued in a state court in Mississippi to recover for cotton belonging to him which the defendant had destroyed in that State during the Civil War in obedience to an enactment of the Confederate States. By special pleas the defendant set up that enactment in justification of the trespass; and the plaintiff insisted by demurrers that the enactment was contrary to the Constitution. The demurrers were overruled and judgment was given for the defendant, which the Supreme Court affirmed. The case was brought to this Court by writ of error. The jurisdiction, although contested, was sustained in an opinion by Mr. Justice

Harlan. He quoted with approval the above extract from *Williams* v. *Bruffy*, and added, p. 603:

"The general orders of the state court overruling the demurrers must be accepted, in every essential sense, as an adjudication in favor of the validity of an act of the confederate congress, recognized and enforced as law in Mississippi, and which act, according to the rule laid down in that case, must be, therefore, regarded by us as a statute of that State, within the meaning of the provisions of the act declaring the appellate jurisdiction of this court. It results that we have power to review the final judgment of the Supreme Court of Mississippi."

Stephens v. *Griffith*, 111 U. S. 48, is a case where the Supreme Court of Tennessee had given effect to an enactment of the Confederate States. This Court there said, after reciting its ruling in *Williams* v. *Bruffy*, p. 51:

"So, in this case the Confederate enactment, under which the confiscation of the money was had, can be treated only as a statute of Tennessee, by whose sanction it was enforced as a law of that State."

New Orleans Waterworks Co. v. *Louisiana Sugar Refining Co.*, 125 U. S. 1, is a case wherein this Court was asked on writ of error to review a judgment of the Supreme Court of Louisiana giving effect to an ordinance of New Orleans against the contention that it impaired the obligation of a contract. The opinion was by Mr. Justice Gray. After stating that, to be within the contract clause of the Constitution, the impairment must be "by a law of the State," and that this Court "has no jurisdiction to review a judgment of the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative act of the State has been upheld by the judgment sought to be reviewed," and after quoting with approval the statement in *Williams* v. *Bruffy*—"Any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this Court," he said, p. 31:

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States."

In *North American Storage Co.* v. *Chicago*, 211 U. S. 306, which came to this Court from a Circuit Court of the United States, the question was presented whether a municipal ordinance was state action within the clause in the Fourteenth Amendment prohibiting "any State" from denying due process or equal protection. The Court said, p. 313:

"In this case the ordinance in question is to be regarded as in effect a statute of the State, adopted under a power granted by the State legislature, and hence it is an act of the State within the Fourteenth Amendment."

The construction which was put on the phrase "a statute of any State" in the jurisdictional provision by the decisions in *Williams* v. *Bruffy*, *Ford* v. *Surget* and *Stephens* v. *Griffith* did not stop with those cases, but has been approvingly followed and applied in later cases.

In *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, this Court was asked to review on writ of error a judgment of the Supreme Court of North Carolina giving effect to a municipal ordinance over the objection that it was invalid under the Constitution of the United States. Mr. Justice Pitney, speaking for the entire court, sustained its jurisdiction and on that point said, p. 555:

"A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the State, is a state law within the meaning of the Federal Constitution. (Citing cases.)

"And any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the pertinent clause of § 709, Rev. Stat., Judicial Code, § 237, which confers jurisdiction on this court. Williams v. Bruffy, 96 U. S. 176, 183."

Reinman v. *Little Rock*, 237 U. S. 171, came here from the Supreme Court of Arkansas on writ of error. The sole question involved was the validity of a municipal ordinance which the state court had sustained against the objection that it was in conflict with the Constitution of the United States. Mr. Justice Pitney again speaking for the entire court said, p. 176:

"The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purposes of our jurisdiction, as an act of legislation proceeding from the law making power of the State, for a municipal ordinance

passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution; and any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State within the meaning of the Judicial Code, § 237, which confers jurisdiction upon this court. Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 555, and cases cited."

Zuckt v. *King*, 260 U. S. 174, was brought here on writ of error solely on the ground that the state court had upheld a municipal ordinance against the contention that it was invalid under the Constitution of the United States. This Court dealt with the initial question of jurisdiction as follows, p. 176:

"The validity of the ordinances under the Federal Constitution was drawn in question by objections properly taken below. A city ordinance is a law of the State within the meaning of § 237 of the Judicial Code as amended, which provides a review by writ of error where the validity of a law is sustained by the highest court of the State in which a decision in the suit could be had. Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548, 555."

Further applying the ruling in *Williams* v. *Bruffy* this Court repeatedly has held that an order of a state commission made in the exercise of delegated legislative authority is a statute of the State in the sense of the jurisdictional provision. Excerpts from some of the cases—all brought here from state courts on writs of error—will suffice to show the course of decision.

"Such an order, being legislative in its nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction." *Lake Erie & Western R. R. Co.* v. *Public Utilities Commission*, 249 U. S. 422, 424.

"The validity of the order prescribing the rates was directly challenged on constitutional grounds, and it was held valid by the highest court of the State. The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this Court. The motion to dismiss will be denied." *Bluefields Waterworks & Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 683, specifically followed and applied in *Northern Pacific Ry. Co.* v. *Department of Public Works*, 268 U. S. 39, 42.

"The cause is here upon writ of error. Considering the circumstances disclosed by the record we have no jurisdiction unless it affirmatively appears that in the court below there was duly drawn in question the validity of a statute or an authority exercised under the State because of repugnance to the Constitution, treaties or laws of the United States. Jud. Code, § 237, as amended Sept. 6, 1916. Under repeated rulings here, for jurisdictional purposes the order of the Commission must be treated as though an Act of the Legislature." *Los Oso Water Users Ass'n v. R. R. Commission*, 269 U. S. 354, 356.

"The authority of the Dock Commissioner and the Sinking Fund trustees, under the Act of 1871 [they exercised delegated legislative power], is such as to make the plan and the refusal equivalent to a statute of the State, and, assuming that it is in conflict with the grant and covenants of relators' deeds, it is a law of the State impairing a contract obligation under § 10, Article I, of the Federal Constitution. [Citing *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18; *Williams v. Bruffy*, 96 U. S. 176, 184, and other cases.] We have jurisdiction of the writ of error under § 237 of the Judicial Code." *Appleby v. Delaney*, 271 U. S. 403, 409.

A like view of an order, legislative in nature, of a state commission has been taken in other related cases. *Grand Trunk Western Ry. Co. v. Railroad Commission*, 221 U. S. 400, 403; *Louisville and Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 318; *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.* 249 U. S. 134, 141; *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 280, 292.

In no case has the phrase "a statute of any State" in the jurisdictional provision been construed otherwise than as shown in the foregoing review. With its use elsewhere—especially in connections indicative of its use in a different sense—we are not now concerned.

It is said that the act of February 13, 1925, which amended the jurisdictional provision was enacted with the purpose of contracting the obligatory jurisdiction of this Court. We recognize that there was such a purpose and that effect should be given to it. But the act dealt with several jurisdictional provisions, including those relating to cases coming to this Court from the Circuit Courts of Appeals, the District Courts, the Court of Appeals of the District of Columbia and the Court of Claims. It shows that the purpose was to cut down and change our jurisdiction in particular respects and to leave it as before in others. We are concerned here with a particular jurisdiction, as to which there was no cut-

ting down or change. The terms whereby it was defined in the original provision were retained, and thus it was left as before.

We accordingly hold that the ordinance in question is a statute of the State within the meaning of the jurisdictional provision, and therefore that this case is rightly here on writ of error. So we turn to the merits.

The adoption and terms of the ordinance are not in dispute. Nor is it questioned that the city became obligated long before the ordinance to supply water power from its canal for the plaintiff's mill. But it is questioned that there was any engagement for a designated price or rate in perpetuity. Both courts below found for the city on this point. That finding is entitled to respect, but is not conclusive, for it rests with this Court in cases like this, where contract obligations are said to have been impaired by subsequent legislation contrary to the constitutional restriction, to determine whether there was a contract and what obligations arose from it. *St. Paul Gas Light Company* v. *St. Paul*, 181 U. S. 142, 147; *Appleby* v. *New York*, 271 U. S. 364, 379-380. It is admitted that there was here no formal contract. But it is insisted that a contract arose from conversations and correspondence between representatives of the plaintiff and officers of the city, and that it included an engagement for a designated price or rate in perpetuity. The proofs have been considered. It would serve no purpose to review them in this opinion. We think they fall short of showing any engagement respecting the rate, other than that it was to be the established rate for users in general. The rate had been fixed by ordinance when the plaintiff obtained the right to have water power supplied to its mill, but there was, as we construe the proofs, no engagement that that rate should continue indefinitely. The city may be under a duty to supply the power at a reasonable rate [See *Millers* v. *Augusta*, 63 Ga. 772], but that question is not in this case. The plaintiff's objection is confined to the asserted impairment of a prior contract.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 392.—October Term, 1927.

John P. King Manufacturing Co., Plaintiff in Error, vs. City Council of Augusta. } On Writ of Error to the Supreme Court of the State of Georgia.

[May 14, 1928.]

Mr. Justice Brandeis (with whom Mr. Justice Holmes concurs), dissenting.

I think that the writ of error should be dismissed. The judgment below was entered after the effective date of the Act of February 13, 1925, c. 229, 43 Stat. 936, 937, 942. That Act struck from § 237 of the Judicial Code the words "or an authority exercised under any State."[1] The section as so amended limits the right of review by writ of error to cases where the highest court of a State has denied the validity of a treaty or statute of the United States, or has affirmed the validity of a statute of a State, challenged as repugnant to the Constitution, treaties, or laws of the United States. Other cases can be reviewed only if this Court, in the exercise of its discretion, grants a writ of certiorari. Here the challenge was to the validity of an ordinance of a city. I cannot believe that if Congress had intended to maintain our jurisdiction to review judgments sustaining such ordinances on writ of error, it would not have found clearer language in which to express its purpose.

The question before us is the interpretation, not of the word "laws," used in the Constitution, but the narrower term "statute", employed in the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 73, 85. And our task is to construe, not the single word "statute", but the phrase "statute of any State." Laws or regulations adopted by a municipality are called, in common speech, either ordinances or

[1] The Act of 1925 also struck out the words "or an authority exercised under the United States."

by-laws, not "statutes".[1] In some connections, rules established by an institution are referred to as statutes. Thus, the rules adopted by a university or its founder are sometimes spoken of as statutes of the university. But no one would call them statutes of the State under whose law the university is incorporated. Nor would any one, in referring to the laws or regulations adopted by municipal or other corporations, speak of them as "statutes of the State". Has the phrase as originally used in § 25 of the Judiciary Act of September 4, 1789, c. 20, 1 Stat. 73, 85, and as reenacted in § 2 of the Act of February 5, 1867, c. 28, 14 Stat. 385, 386, in § 709 of the Revised Statutes, in § 237 of the Judicial Code, and finally in the Act of 1925, acquired a different, a conventional, meaning so that it must be held to include municipal ordinances?

Our jurisdiction to review a judgment of a state court sustaining the validity of a municipal ordinance alleged to be repugnant to the Federal Constitution, was first invoked in *Weston* v. *City Council of Charleston*, 2 Pet. 449, 463-464. Section 25 of the Judiciary Act of 1789, which was then in force without amendment, authorized a review by writ of error in any case "where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution,

[1] These are the terms employed in the charters of American cities and towns both before and since the adoption of the Constitution. They have been continuously employed apparently by all text writers on municipal corporations and government. "Local laws of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform and permanent rules of conduct, relating to the corporate affairs of the municipality, are, in this country, generally designated as ordinances. 'By-laws' or 'bye-laws' was the original designation." McQuillin, Municipal Ordinances, § 1; 2 McQuillin, Municipal Corporations, § 632. "The result of legislative action by a municipal council or assembly is a local law usually denominated an ordinance." 2 Abbott, Municipal Corporations, § 514. *See also* Dillon, Municipal Corporations, 1 ed., p. 270; Munro, Municipal Government and Administration, p. 209; Reed, Municipal Government, p. 173. No instance has been found where such writers have used the word "statutes" in referring to municipal ordinances.

treaty, statute or commission." The jurisdiction having been questioned, because of the nature of the proceeding, Mr. Chief Justice Marshall took occasion to specify the clause of § 25 on which he conceived the jurisdiction to rest:

"In this case the city ordinance of Charleston is the exercise of an 'authority under the state of South Carolina,' 'the validity of which has been drawn in question on the ground of its being repugnant to the constitution,' and 'the decision is in favour of its validity.'"

The jurisdiction then declared was exercised, without question, in the cases involving municipal ordinances that came before the Court during the next half century.[1] In 1876 the subject was carefully reconsidered in *Home Insurance Co.* v. *City Council of Augusta*, 93 U. S. 116, 118, 121. After stating the possible bases of jurisdiction under § 709 of the Revised Statutes, the Court said:

"Here there was drawn in question the authority exercised by the city council under the State in passing the ordinance imposing the tax complained of. The question raised was as to its repugnancy to the Constitution of the United States; and the decision was in favor of the validity of the authority so exercised. A right was also claimed under the Constitution of the United States. The decision was adverse to the claim. The case is, therefore, within two of the categories we have stated. The jurisdictional objection cannot be maintained."

The Court would hardly have omitted to say that review might also have been had by virtue of the "statute" clause if it had been of opinion that a municipal ordinance could be properly so described.

The second of the categories mentioned in *Home Insurance Co.* v. *City Council of Augusta*, was eliminated, so far as the right to review by writ of error was concerned, by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. In cases where the showing was merely that a title, right, privilege or immunity guaranteed by the Constitution had been claimed and denied, that Act provided that there could be no review except by certiorari. But as it left unchanged the clause regarding the validity of an authority, on which Mr. Chief Justice Marshall had based the power of this Court to review judgments sustaining municipal ordinances, our jurisdiction

[1] Waring v. The Mayor, 8 Wall. 110; Woodruff v. Parham, 8 Wall. 123; Osborne v. Mobile, 16 Wall. 479; Cannon v. New Orleans, 20 Wall. 577. Compare Barron v. Baltimore, 7 Pet. 243, 245 246.

over such judgments remained unaffected. When, in 1925, the "authority" clause was struck from § 237 of the Judicial Code and our jurisdiction on writ of error under that section was limited to cases involving the validity of a statute, Congress cannot have been unaware of the difference, for jurisdictional purposes, between a statute of a State and a municipal ordinance. For attention had been called to the difference by numerous decisions under several jurisdictional acts—the most recent being of wide public interest.

The Act of June 18, 1910, c. 309, 36 Stat. 539, 557, § 17 of which was embodied in the Judicial Code as § 266, declared that "no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute" should issue except upon a hearing before three judges as there provided. An unbroken line of decisions, beginning in 1911, has held that a municipal ordinance is not a statute within the meaning of that section. *Sperry & Hutchinson Co.* v. *City of Tacoma*, 190 Fed. 682; *Cumberland Telephone & Telegraph Co.* v. *City of Memphis*, 198 Fed. 955; *Birmingham Water Works Co.* v. *City of Birmingham*, 211 Fed. 497, affirmed, 213 Fed. 450; *Calhoun* v. *City of Seattle*, 215 Fed. 226; *City of Des Moines* v. *Moines Gas Co.*, 264 Fed. 506; *City of Dallas* v. *Dallas Telephone Co.*, 272 Fed. 410. See also *Land Development Co.* v. *City of New Orleans*, 13 F. (2d) 898, reversed on the merits, 17 F. (2d) 1016. The principal ground of these decisions, namely, "that the natural meaning of 'statute of a state' is a statute or law directly passed by the Legislature of the state, and the natural meaning of 'any officer of such state' is an officer whose authority extends throughout the state, and is not limited to a small district," (198 Fed. 955, 957) is, of course, equally applicable to § 237 of the Judicial Code. It cannot have been unknown to Congress. The construction had already been established when the Act of March 4, 1913, c. 160, 37 Stat. 1013, amended § 266 so as to make it clearly applicable to suits to enjoin the orders of a state commission.* The

*See the debate in the Senate at the preceding session, 48 Cong. Rec. 8120-8123. The House Committee on the Judiciary was "of the opinion that the statute should be broadened, so as to prevent this kind of interference (i. e., by a single judge) with State officials who are performing their duties under the provisions of a statute enacted by the legislature of a State." House Report, 62d Cong., 3d Sess., No. 1584, p. 2. Mr. Clayton, who was in charge

amending Act inserted after the words "in the enforcement or execution of such statute," the words "or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State." Congress did not include in the amendment any reference to municipal ordinances. The fact that it did not is significant.[5]

Prior to the Act of 1925, the difference, for purposes of appellate review, between a statute and a law enacted by a subordinate legislative body, had been called to the attention of Congress also by the cases which settled that the enactments of the legislatures and other law-making bodies of the territories and of the District of Columbia are not statutes of the United States within the meaning of legislation governing the jurisdiction of this Court. The question appears to have arisen first under the Act of March 3, 1885, c. 355, § 2, 23 Stat. 443. The phraseology of this statute was similar to that of § 25 of the Judiciary Act of 1789, and this Court has always recognized that decisions under it and its later reenactments are authoritative with regard to the construction of § 237

of the bill in the House, said that its purpose was "to put the order of a State railroad commission upon an equality with a statute of a State; in other words, to give the same force and effect to the order of a State railroad commission fixing rates as is accorded under existing law to a State statute." 49 Cong. Rec. 4773.

[5] This Court has not passed expressly on the construction to be given § 266 in this respect. Until amended by the Act of February 13, 1925, § 266 did not require the presence of three judges at the final hearing; and on appeal to this Court from the final decree the propriety of the action of the single judge in granting or denying a temporary injunction was not strictly in issue. Shaffer v. Carter, 252 U. S. 37, 44. But if this Court had doubted the power of a District Judge to act in such cases, it would hardly have mentioned without comment the fact that such a judge had granted or denied a temporary injunction. This it has done in a number of cases. See United Railroads v. San Francisco, 249 U. S. 517, 519; Southern Iowa Electric Co. v. Chariton, 255 U. S. 539, 541; Galveston Electric Co. v. Galveston, 258 U. S. 388, 390; Paducah v. Paducah Ry. Co., 261 U. S. 267, 271; St. Cloud Public Service Co. v. St. Cloud, 265 U. S. 352, 355. Since the effective date of the Act of 1925, this Court has decided, on certiorari to Circuit Courts of Appeals, a number of cases in which an application for a temporary injunction against the enforcement of a municipal ordinance had been heard before, and the final decree rendered by, a single district judge. See Hammond v. Schappi Bus Line, 275 U. S. 164; Hammond v. Farina Bus Line & Transportation Co., 275 U. S. 173; Delaware, Lackawanna & Western R. R. Co. v. Morristown, No. 147, decided February 20, 1928. If a municipal ordinance had been a statute within § 266, the decrees of the district judges in these cases would have been void for want of jurisdiction.

of the Judicial Code.[2] It permitted review of any judgment of the Supreme Court of a Territory or of the District of Columbia where "is drawn in question the validity of a treaty or statute of or an authority exercised under the United States." Thereafter, that provision, as modified by the Act creating the Court of Appeals for the District, February 9, 1893, c. 74, § 8, 27 Stat. 434, 436; District Code, § 233, 31 Stat. 1189, 1227, governed our appellate jurisdiction over the highest courts of the continental territories (other than Alaska) and of the District until the enactment of the Judicial Code, in which it was embodied as § 245 and, with important changes, as § 250. That our appellate jurisdiction over judgments involving the validity of acts of territorial legislatures and of the legislative body of the District depended on the clause in the Act of 1885 allowing such review where the validity of an authority exercised under the United States had been challenged, was indicated in *Maricopa & Phoenix R. R. Co.* v. *Arizona*, 156 U. S. 347, 350-351, and *Parsons* v. *District of Columbia*, 170 U. S. 45, 49-50. The subject was fully discussed in more recent opinions. Thus, in *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 47-48, our jurisdiction to review a judgment of the Supreme Court of New Mexico upholding the validity of a territorial law was sustained on the ground that "the validity of an authority exercised under the United States in the passage and enforcement

[2] See Ireland v. Woods, 246 U. S. 323, 328, citing and following Champion Lumber Co. v. Fisher, 227 U. S. 445, 451; Erie R. R. Co. v. Hamilton, 248 U. S. 369, 372, citing and following Baltimore & Potomac R. R. Co. v. Hopkins, 130 U. S. 210, District of Columbia v. Gannon, 130 U. S. 227, and United States v. Lynch, 137 U. S. 280, 285; Jett Bros. Distilling Co. v. City of Carrollton, 242 U. S. 1, 6, citing and following Baltimore & Potomac R. R. Co. v. Hopkins, 130 U. S. 210, and Champion Lumber Co. v. Fisher, 227 U. S. 445, 450, 451; Schaff v. Famechon Co., 238 U. S. 76, 81, citing and following Baltimore & Potomac R. R. Co. v. Hopkins, 130 U. S. 210; Zuntz v. King, 260 U. S. 174, 177, citing and following Taylor v. Taft, 203 U. S. 461, and Champion Lumber Co. v. Fisher, 227 U. S. 445; Lancaster v. McCarty, 267 U. S. 427, 430, citing and following Champion Lumber Co. v. Fisher, 227 U. S. 445, 451. The significance of decisions under the Act of 1885 is confirmed by the legislative history of the Act, which shows, as seemed probable from its language, that the provision with respect to "a treaty or statute of or an authority exercised under the United States," was derived, like § 237 of the Judicial Code, from § 25 of the Judiciary Act of 1789. See 16 Cong. Rec. 670-671.

of the law is directly challenged, and the case does involve the validity of an authority exercised under the power derived from the United States." The right to review on appeal a judgment involving the validity of an ordinance or regulation of the District of Columbia was rested upon the same ground in *Smoot* v. *Heyl*, 227 U. S. 518, 522, although the statute authorizing the District Commissioners to make regulations provided that they should "have the same force and effect within the District of Columbia as if enacted by Congress." Act of June 14, 1878, c. 194, 20 Stat. 131. See also *Walker* v. *Gish*, 260 U. S. 447, 449.

A similar ruling was made in *Board of Public Utility Commissioners* v. *Manila Electric R. R. Co.*, 249 U. S. 262, where this Court dismissed an appeal and a writ of error to review, under § 248 of the Judicial Code, a judgment of the Supreme Court of the Philippine Islands. That section, until amended by the Act of September 6, 1916, c. 448, 39 Stat. 726, 727, authorized review by writ of error or appeal, of a judgment of the highest court of the Philippine Islands where either the validity or the construction of a statute of the United States was involved. *Reavis* v. *Fianza*, 215 U. S. 16, 21-22; *Gsell* v. *Insular Collector*, 239 U. S. 93, 94-96. The Railroad challenged an order of the Commissioners purporting to be made in execution of an Act of the Philippine Commission authorizing the city of Manila to grant a franchise ordinance passed under the powers thereby granted. This Court dismissed the appeal and writ of error for want of jurisdiction, necessarily holding "that the mere construction by the court of the franchise ordinance, and its consequent ruling that the duty did not rest on the Railroad Company to give the free transportation which the orders of the Commissioners had directed to be given" did not involve either the construction or the validity of a statute of the United States.

Obviously, the statutes of territorial legislatures, the regulations of the Commissioners of the District of Columbia, and the Philippine statutes and ordinances bear a relation to acts of Congress that is wholly comparable to that borne by municipal ordinances to the statutes passed by the legislature of a State. Congress cannot have intended that in the Act of 1925, the phrase "statute of any State" should be read as including municipal ordinances within a State while, under like circumstances, the phrase "statute of the United States" does not include the ordinances of the Dis-

trict of Columbia, even where the enabling act provides that the ordinances shall have the same force as if enacted by the Congress of the United States.

Moreover, if municipal ordinances are deemed to be statutes of a State within the meaning of § 237 (a) of the Judicial Code, legislative orders of state commissions, boards, and officials must be also. Prior to the Act of 1925, judgments sustaining the validity of such orders were reviewable on writ of error as fully as judgments sustaining the validity of statutes and ordinances. Between the effective date of the Act of 1916 and that of the Act of 1925, this Court wrote opinions in 21 cases in which a judgment of the highest court of a State involving the validity of an order of a commission was reviewed on writ of error.[1] In none of the opinions was it stated that jurisdiction existed because an order is a statute of a State.[2] On the other hand, in *Lancaster* v. *McCarty*, 267 U. S. 427, 430, where our jurisdiction was invoked to review, on writ of error, the judgment of a state court denying the validity of an order of the Interstate Commerce Commission, the jurisdiction was sustained on the ground that the order "is an authority exercised under the United States which by the contention of the shippers was drawn in question, and its validity denied by the state court." Can it be that, while our power to review on writ of error a judgment of a state court denying the validity of an order of the Interstate Commerce Commission rested

[1] In Live Oak Water Users Association v. Railroad Commission, 269 U. S. 354, the Court, while asserting its jurisdiction over judgments sustaining such orders, dismissed a writ of error, as the judgment below rested on adequate non-federal grounds.

[2] The jurisdiction was first challenged in Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U. S. 679. The Court said at p. 683: "The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this Court." In Northern Pacific Ry. Co. v. Department of Public Works, 268 U. S. 39, 42, jurisdiction was assumed on the authority of the Bluefield case. In Live Oak Water Users Association v. Railroad Commission, 269 U. S. 354, 356, the Court said that "for jurisdictional purposes the order of the Commission must be treated as though an Act of the Legislature." This was said, of course, with reference to the situation under the Act of 1916, for the judgment under review was entered October 23, 1923.

on the "authority" clause, our power to review a judgment sustaining the validity of an order of a state commission did not[9]

The difference between a statute and an ordinance for purposes of appellate review—a difference which rests wholly on expediency—had been acted upon by Congress half a century earlier, when it undertook to deal with the congestion of business in this Court by regulating the priority of hearings in revenue cases. Act of June 30, 1870, c. 181, 16 Stat. 176; *Davenport City* v. *Dows*, 15 Wall. 390, 392.[10] It was reaffirmed when Congress, in 1925, withdrew the right to a direct appeal from the District Court in cases involving the validity of municipal ordinances, though allowing such an appeal in certain cases involving the validity of statutes and orders of commissions. On the other hand, the essential identity of statutes, ordinances, and orders, where the question concerns substantive rights, has always been recognized. Since all regulations established by competent authority are laws, the comprehensive term "laws" has been used when it was desired to include all forms of legislative

[9]Since the effective date of the Act of 1925, no judgment of a state court has been reviewed by this Court on writ of error, where the sole claim was that a commission order was unconstitutional. In the following cases, governed by the Act of 1925, in which this Court reviewed on writ of error a judgment of a state court sustaining the validity of a commission order, the validity of the underlying statute as well as of the order was attacked: Frost & Frost Trucking Co. v. Railroad Commission, 271 U. S. 583; Chicago, Milwaukee & St. Paul Ry. Co. v. Railroad Commission, 272 U. S. 605; Miller Lumber Co. v. Floyd, 274 U. S. 672 (Per Curiam); Fox River Paper Co. v. Railroad Commission, 273 U. S. 651; Pierce v. Barker, 274 U. S. 718 (Per Curiam); Stimson Lumber Co. v. Kuykendall, 275 U. S. 207; International Great Northern R. R. Co. v. Railroad Commission, No. 90, decided December 5, 1927 (Per Curiam). In Chicago, Milwaukee & St. Paul Ry. Co. v. Public Utilities Commission, 274 U. S. 344, and in Aetna Insurance Co. v. Hyde, No. 112, decided January 3, 1928, the review was by certiorari. In Aetna Insurance Co. v. Baker, No. 731, decided March 5, 1928, certiorari was denied. Compare Phillips v. Oklahoma, 274 U. S. 721 (Per Curiam); Phillips v. Oklahoma, No. 20, decided October 24, 1927 (Per Curiam); Missouri v. Public Service Commission, Nos. 21 27, decided October 24, 1927 (Per Curiam).

[10]Mr. Chief Justice Chase explained why the Act should be construed as applying only to statutes and not to municipal ordinances: "This preference is given, plainly enough, because of the presumed importance of such cases to the administration and internal welfare of the States, and because of their dignity as equal members of the Union. The reasons for preference do not apply to municipal corporations, more than to railroad and many other corporations." p. 392.

action.[11] Thus, as the enactments of a subordinate body exercising legislative authority are a part of the laws of a State, an ordinance or an order is a law within the meaning of the contract clause and is state action within the prohibitions of the Fourteenth Amendment. *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306, 313; *Grand Trunk Ry. Co.* v. *Railroad Commission*, 221 U. S. 400, 403; *Ross* v. *Oregon*, 227 U. S. 150, 162-163; *Lake Erie & Western R. R. Co.* v. *Public Utilities Commission*, 249 U. S. 422, 424; *Standard Scale Co* v. *Farrell*, 249 U. S. 571, 577. For, as this Court has pointed out in *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 30, 31; "it is not strictly and literally true, that a law of a State, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the State as their fundamental law."[12]

Prior to the Act of 1925, final judgments of a district or circuit court involving the constitutional validity of a municipal ordinance could be brought directly to this Court by writ of error or appeal under § 5 of the Court of Appeals Act, Act of March 3, 1891, c. 517, 26 Stat. 826, 827 828, and § 238 of the Judicial Code, because such review was authorized "in any case that involves the construction or application of the Constitution of the United

[11] "In procedural matters—which, like jurisdiction, rest upon considerations of expediency—the difference between statutes and ordinances has been observed, in some instances, even when in the legislation the more comprehensive term "laws" was used. Such was the case in Davenport City v. Dows, *supra*. Again, while municipal ordinances are "laws of the several states" within the meaning of § 34 of the Judiciary Act of 1789, 1 Stat. 73, 92, and § 721 of the Revised Statutes, they will not be judicially noticed in the federal courts; *for* "an ordinance is not a public statute, but a mere municipal regulation." Robinson v. Denver Tramway Co., 164 Fed. 174, 176. Compare Garlich v. Northern Pacific Ry. Co., 131 Fed. 837, 839; Choctaw, O. & G. R. R. Co. v. Hamilton, 182 Fed. 117, 121.

[12] It was on this statement of Mr. Justice Gray's that the Court relied in North American Cold Storage Co. v. Chicago, 211 U. S. 306, 313, where it answered a contention that a bill alleging only municipal legislative action presented no constitutional question sufficient to sustain the jurisdiction of the circuit court, by saying: "In this case the ordinance in question is to be regarded as in effect a statute of the State, adopted under a power granted it by the state legislature, and hence it is an act of the State within the Fourteenth Amendment."

States," and "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States". *Davis & Farnum Manufacturing Co.* v. *City of Los Angeles*, 189 U. S. 207, 216; *Boise Artesian Water Co.* v. *Boise City*, 230 U. S. 84, 90; *see Standard Scale Co.* v. *Farrell*, 249 U. S. 571, 577. And likewise a case involving the constitutional validity of an ordinance could be brought here on writ of error to or on appeal from the Circuit Court of Appeals if the jurisdiction of the district or circuit court had been invoked in part on constitutional grounds. *City of Vicksburg* v. *Henson*, 231 U. S. 259, 267. But in 1925 Congress amended § 238 so as to confine the right to a direct appeal in cases involving the validity of state action to those which fell within the provisions of § 266—provisions which had already been construed as not including municipal ordinances. Unless the phrase "statute of any State" as used in §§ 237(a) and 240(b) of the Judicial Code as amended, includes municipal ordinances, no case from any lower court involving only the validity of a municipal ordinance can now be reviewed by this Court otherwise than upon certiorari.

When it is borne in mind that the severe limitations upon the right of review by this Court imposed by the Act of 1925 were made solely because the increase of the Court's business compelled, the reasons why Congress should have taken away the right to a review by writ of error to the highest court of a state in cases involving the validity of ordinances, while leaving unaffected the right in cases involving the validity of statutes, becomes clear. There are only 48 States. In 1920 there were 924 municipalities in the United States of more than 8,000 inhabitants.[17] The validity of ordinances of even smaller municipalities had come to this Court for adjudication.[18] The increasingly complex conditions of urban

[17]Fourteenth Census of the United States (1920), vol. I, table 27.

[18]*See, e. g.*, Brennan v. Titusville, 153 U. S. 289; Wabash R. R. Co. v. Defiance, 167 U. S. 88; Wilson v. Eureka City, 173 U. S. 32; Shanecateles Water Co. v. Shanecateles, 184 U. S. 354; Western Union Telegraph Co. v. New Hope, 187 U. S. 419; Williams v. Talladega, 226 U. S. 404; Pierce Oil Corporation v. Hope, 248 U. S. 498. In Village of Terrace Park v. Errett, 273 U. S. 710, and Village of University Heights v. Cleveland Jewish Orphans Home, No. 594, decided November 28, 1927, the Court denied petitions for certiorari in cases where Circuit Courts of Appeals had held the zoning ordinances of small suburban districts to be unconstitutional as applied to the respondents. If ordinances are statutes of a State, these cases could have been brought here

life have led, as this Court noted in *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 386-387, to a corresponding increase in municipal police legislation. Recently, two classes of municipal ordinances, new in character—those relating to zoning and those relating to motor vehicles—had become the subject of many controversies. The constitutionality of these ordinances can rarely be determined simply by applying a general rule. The Court must consider the effect of the ordinance as applied. As the validity of the particular ordinance depends ordinarily upon special facts,[11] these must be examined whenever there is jurisdiction. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. Though no burdensome factual inquiry is involved, the controversy may often be of trifling significance, as in the case at bar. Thus, persuasive reasons existed why Congress should have denied, in 1925, review by writ of error in cases which involved only the validity of a municipal ordinance.

If, by striking out from § 237 of the Judicial Code the clause "or an authority exercised under any State", Congress did not exclude from review by writ of error cases involving the validity of municipal ordinances and commission orders, it wholly failed to accomplish what, in view of the statements made to it in regard to the effect of the amendment,[12] must be deemed to have been its purpose in so amending the section. That is, to relieve this Court, in many cases, of the burden of obligatory review. For, other than these, there had been considered by this Court, in the nine years between the effective dates of the Jurisdictional Acts of 1916 and 1925, and decided with opinions, not more than eight cases involving the validity of an authority exercised under a State or under the United States.[13] On the other hand the forty cases in which

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by writ of error under § 240 (b). In Gorieb v. Fox, 274 U. S. 603, a judgment of a state court sustaining a zoning ordinance was reviewed by certiorari. Compare Township of Maplewood v. Margolis, Nos. 644-645, certiorari denied, January 16, 1928; Nectow v. City of Cambridge, No. 509, decided this day.

[11]The Court has noted this dependence with respect both to zoning ordinances and to bus regulations. See Euclid v. Ambler Realty Co., 272 U. S. 365, 395; Hammond v. Schappi Bus Line, 275 U. S. 164, 170.

[12]See Hearing before a Subcommittee of the Committee on the Judiciary of the United States Senate, 68th Cong., 1st Sess., on S. 2060, p. 35; Hearing before the Committee on the Judiciary of the House of Representatives, 68th Cong., 2d Sess., on H. R. 8206, p. 13.

[13]In only three cases in which opinions were written, aside from those involving municipal ordinances and commission orders, does jurisdiction appear to

judgments of state courts sustaining municipal ordinances or commission orders had been reviewed on writ of error, had entailed a burden out of all proportion to their number. The evidence introduced to establish the facts in cases involving the validity either of orders or of municipal ordinances is often both voluminous and conflicting.[*] Condensation of the evidence is not required, as in cases coming from the lower federal courts. See Equity Rule 75 (b), 226 U. S. Appendix 23; Rule 7 (2), 266 U. S. 657-658. Compare *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, No. 194, decided January 3, 1928. Although the evidence is often conflicting, findings of fact are not required. Compare *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Tompkins*, 176 U. S. 167, 179; *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 223 U. S. 349, 364; *City of Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 171. Congress must have had the threatening volume and the heavy burden of this litigation in mind when it struck from § 237 of the Judicial Code the words "or an authority exercised under any State."

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have been exercised under the clause in the Act of 1916 allowing a writ of error in cases where the validity of an authority exercised under a State has been challenged and sustained: Schwab v. Richardson, 263 U. S. 88; Love v. Griffith, 266 U. S. 32; Appleby v. Delaney, 271 U. S. 403. Possibly, under the view announced by the Court, even such state action as was involved in those cases amounts to "a statute of a state." In five cases jurisdiction seems to have been based on the clause allowing a writ of error where the validity of an authority exercised under the United States has been denied: American Express Co. v. Caldwell, 244 U. S. 617; Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135; Dakota Central Telephone Co. v. South Dakota, 250 U. S. 163; Davis v. Newton Coal Co., 267 U. S. 292; Lancaster v. McCarty, 267 U. S. 427. The first and the last of this group concerned orders of the Interstate Commerce Commission which, presumably, must be held to be statutes of the United States if the orders of state commissions are statutes of a state. Perhaps the other three as well were statutes of the United States under the view now taken by the Court.

[*] Thus, in Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276, the record was 685 pages in length. In Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U. S. 679, the record extended over 1398 pages. The record in Northern Pacific Ry. Co. v. Department of Public Works, 268 U. S. 39, contained 1131 pages in addition to numerous exhibits. In Hammond v. Schappi Bus Line, 275 U. S. 164, and Hammond v. Farina Bus Line & Transportation Co., 275 U. S. 173, the Court found itself compelled to remand to the District Court in order for that court to make proper findings of fact.

From the decision of *Weston* v. *City Council of Charleston*, 2 Pet. 449, 463-464, in which Mr. Chief Justice Marshall rested the jurisdiction of this Court to review the judgments of state courts involving the validity of municipal ordinances upon the clause "or an authority exercised under any State", to the passage of the Act of 1925, ninety-six years elapsed. During that period the Court wrote opinions in a multitude of cases in which that specific jurisdiction was exercised. In only two of them has there been found any statement that the jurisdiction could be sustained on the ground that a municipal ordinance is a statute of a State, within the meaning of § 25 of the Judiciary Act of 1789 or its later reenactments. These two opinions were written at successive terms by the same member of the Court. *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 555; *Reinman* v. *Little Rock*, 237 U. S. 171, 176. An examination of the record and briefs in the two cases seems to make it clear that the statements were obiter and were made inadvertently. No question of the jurisdiction of this Court under § 237 of the Judicial Code was raised or discussed by counsel in either case; and this Court could not, under the legislation then in force, have entertained a doubt as to the existence of the jurisdiction. Neither opinion of the Court refers to *Weston* v. *City Council of Charleston*, 2 Pet. 449, 463-464, or to *Home Insurance Co.* v. *City Council of Augusta*, 93 U. S. 116, 121—the cases which, on full consideration, had settled that the basis of our jurisdiction was the clause relating to the validity of an authority. Neither refers to *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 47-48, or to *Smoot* v. *Heyl*, 227 U. S. 518, 522—the cases which had recently confirmed that ruling. There was obviously no intention to overrule these cases.

The only authority cited in support of the statement in the *Goldsboro* and *Little Rock* cases, *Williams* v. *Bruffy*, 96 U. S. 176, 183, furnishes no basis for them. That case involved an act of the Congress of the Confederate States—a body whose legislation would obviously be described in common speech as "statutes". It was conceded that the particular act was a "statute". The question was whether it was a statute "of any State".[1] The Court held

[1] That the sole question discussed was whether the act of the Congress of the Confederate States was an act of "any State" appears from the briefs on file in the office of the Clerk. See Supplemental Brief of Enoch Totten for the Plaintiff in Error, pp. 10-11; Brief of Henry W. Garnett for the Defendant

that since the enactment had been given the force of law in Virginia, it was as much the action of that State as if it had been originally passed by an authorized legislative body. In being so adopted by Virginia the enactment clearly did not lose the quality which it had had from its inception, namely, that of being a "statute". It was in this connection that Mr. Justice Field said: "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court." This language was used with reference to the acts of an irregular legislative body whose enactments would be commonly described as "statutes." It had no reference to the acts of a regular legislative body whose enactments would never be characterized as statutes, in ordinary speech. That Mr. Justice Field would not so have applied it, is clear. For in the term of Court preceding that in which *Williams* v. *Bruffy* was decided, he had participated in the decision in *Home Insurance Co.* v. *City Council of Augusta*, 93 U. S. 116, 121, in which the Court had plainly indicated that a municipal ordinance was not a "statute of any State."

The dicta concerning our jurisdiction in *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, and in *Reinman* v. *Little Rock*, have never been repeated in any later case dealing with municipal ordinances, even where the decisions in the two cases have been relied upon. Some care seems to have been taken not to repeat the expression that a municipal ordinance was a statute of a State. *See Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526, 529; *Zucht* v. *King*, 260 U. S. 174, 176. To construe the phrase "statute of any State" as applying to a municipal ordinance disregards the common and ap-

In Error, p. 3; Brief of William A. Maury, as *amicus curiae*, pp. 4, 5, 7. The question was thus stated by Mr. Maury on p. 5 of his brief: "Upon what ground, then, can it be maintained that a statute of, or authority exercised under, the hostile *de facto* Government of Virginia was the statute of or authority of a State, in the sense of the law which is this Court's commission to take cognizance of appeals from the state tribunals? (5 How., Scott ex. Jones)." The case cited by Mr. Maury, 5 How. 343, 376, held that the statutes of an unorganized political body were not statutes "of a State" within the meaning of § 25 of the Judiciary Act, although that body later became a State. In Miners Bank v. Iowa, 12 How. 1, a territorial statute was held not to be a statute "of a State" within § 25, though the Territory had since become a State. The language in Ford v. Surget, 97 U. S. 594, 603, 604, and Stevens v. Griffith, 111 U. S. 48, 50, also makes clear the exact point of the decision in Williams v. Bruffy.

propriate use of the words; ignores decisions which for nearly a century have governed our jurisdiction to review judgments of state courts sustaining the validity of such ordinances; and tends to defeat the general purpose of the Act of 1925 "to relieve this Court by limiting further the absolute right to a review by it." *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317, 321; *Smith* v. Wilson, 273 U. S. 388, 390.[10] It completely frustrates the particular purpose which Congress must have had in striking from § 237 the clause "or an authority exercised under any state."[11] The trivial character of the substantive question presented by this case—in which a writ of certiorari, if applied for, would plainly not have been granted—illustrates the wisdom of Congress in limiting our jurisdiction on writ of error.

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[10] Much weight was given to this purpose in construing earlier acts reducing our jurisdiction. Compare McLish v. Roff, 141 U. S. 661, 666; Robinson v. Caldwell, 165 U. S. 359, 362; American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 281, all construing the Circuit Courts of Appeals Act, March 3, 1891, c. 517, 26 Stat. 826; American Security & Trust Co. v. District of Columbia, 224 U. S. 491, 495, construing § 250 of the Judicial Code; Inter-Island Steam Navigation Co., Ltd., v. Ward, 242 U. S. 1, construing § 246 of the Judicial Code, as amended by the Act of January 28, 1915, c. 22, 38 Stat. 803.

[11] Since the effective date of the Act of 1925, judgments of state courts sustaining the validity of municipal ordinances have been reviewed on writ of error in a number of cases. Beery v. Houghton, 273 U. S. 671 (Per Curiam); Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392; Angelo v. Winston-Salem, 274 U. S. 725 (Per Curiam); Bloecher & Schaaf v. Baltimore, No. 35, decided October 24, 1927 (Per Curiam); Kroger Co. v. Dayton, No. 109, decided December 5, 1927 (Per Curiam). Compare Natchez v. McNeely, No. 94, decided December 5, 1927 (Per Curiam). But in none of them did counsel question the jurisdiction of this Court, or call to our attention the significance of the amendment of § 237 made by the Act of 1925. It is well settled that the exercise of jurisdiction under such circumstances is not to be deemed a precedent when the question is finally brought before us for determination. United States v. Moore, 3 Cranch, 159, 172; Snow v. United States, 118 U. S. 346, 354; Cross v. Burke, 146 U. S. 82, 86; Louisville Trust Co. v. Knott, 191 U. S. 225, 236; Arant v. Lane, 245 U. S. 166, 169.